TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 232.

CHARLES E. YATES, LOUISA HAMER, ADM'X OF ELIS P. HAMER, DECEASED; CHARLES W. MOSHER, ET AL., PLAINTIFFS IN ERROR,

vs.

THOMAS BAILEY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MARCH 20, 1906.

(20,141.)

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1 No. 13032.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased, and David E. Thompson
v.
THOMAS BAILEY.

RICHARD C. OUTCALT
v.
THOMAS BAILEY.

CHAS. W. MOSHER
v.
THOMAS BAILEY.

Pleas before the Supreme Court of the State of Nebraska, at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 2nd day of January, A. D. 1906.

Present: Hon. Samuel H. Sedgwick, Chief Justice; Hon. John B. Barnes, Judge; Hon. Charles B. Letton, Judge.
Attest:
H. C. LINDSAY, *Clerk.*

Be it remembered, that on the 28th day of November, A. D., 1902, there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Charles E. Yates in the words
2 and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, Plaintiff in Error,
v.
THOMAS BAILEY Defendant in Error.

Petition in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county, Nebraska, for the sum of $11,054.69 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $1372.32; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $9,682.37 in said action pending in said court, wherein the

defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

1st. The court erred in overruling the objections of this de-
3 fendant below to the introduction of any testimony, at the time the same was offered on trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct damage to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plain- below in
4 his individual capacity against the defendant below.

2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for himself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principle and requirements specified in Sections 5239 and other sections of the National Banking Act.

6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the *sixth* paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant Charles E. Yates, for the reason that the plaintiff's cause of action, if it ever had any against him, did not accrue to him within five years prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

11th. The court erred in refusing to give force and effect to the former adjudication of the claim of the said Thomas Bailey for the same cause of action against the same defendants as presented in the case herein; and, in allowing judgment to be entered in favor of the said Thomas Bailey and against the said defendants, refused to give faith and credit to the final judgment that was entered in the Circuit Court of the United States for the District of Nebraska, between the same parties on the same cause of action, being a full and final adjudication of the same questions and cause of action involved in the present case; the error of the court therein being a direct violation of the Constitution and laws of the United States.

12th. The court erred in refusing to give the seventeenth paragraph of the instructions requested by the defendant below, numbered 17.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Endorsed: 13032. Charles E. Yates, *et al. v.* Thomas Bailey. Petition in Error of Charles E. Yates. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Petition in Error of Louisa Hamer, Administratrix, in the words and figures following, to-wit:

6 In the Supreme Court of the State of Nebraska.

LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Dec'd, Plaintiff in Error,

v.

THOMAS BAILEY, Defendant in Error.

The plaintiff complains of the defendant, for that on the 21st day of July, 1902, the defendant herein recovered a judgment against the plaintiff herein, in the district court of Seward county, Nebraska, for the sum of $11,054.69 and costs amounting to the sum of $—. That subsequently, and on the 22nd day of October, 1902, at the same term of said court, an order was made by said court requiring the said defendant in error to remit a portion of said judgment, as the same was excessive to the extent of $1372.32; and that said defendant in error filed a remittitur in obedience to the order of said court, and judgment was then formally entered in favor of the defendant in error and against this plaintiff in error, in the sum of $9,682.37 in said action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein was defendant.

A transcript of said judgment, pleadings and proceedings in said cause, together with the bill of exceptions containing all of the evidence introduced, is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment, in this:

7 1st. The court erred in overruling the objections of this defendant below to the introduction of any testimony, at the time the same was offered on the trial of said cause, as appears by the bill of exceptions in said cause, page 8; said objection being based upon the character of the case as made in the plaintiff's petition, it being strictly and specifically alleged that the defendant below in the several acts of misconduct, negligence, misfeasance and fraud of which the plaintiff complained, acted in his official capacity as a director of the Capital National Bank; and that acting as such director it became and was his duty under the law, as well as the by-laws of said National Bank, as is alleged, to do various and sundry things which he neglected to do, and which he purposely omitted to do; and that in his official capacity, and acting as such director, he did various things, as is specifically alleged, in violation of his duties and obligations as a director of said bank, under the law and the by-laws of said bank, thereby causing heavy losses to the said bank, which caused its insolvency, and which it is alleged resulted in a damage to the plaintiff below; whereas, if said allegations of misfeasance, nonfeasance and fraud of said defendant below in his capacity as a director of said National Bank were true, any damage caused by the facts alleged would be a direct dam-

age to said bank, and any recovery therefor would be an asset of said bank to be ratably distributed among the creditors and stockholders of said bank; and such damages were recoverable alone by said bank, or the receiver of said bank, and not by the plaintiff below in his individual capacity against the defendant below.

8 2nd. The court erred in rendering judgment against the defendant below, for the reason that under the issues joined and the evidence introduced, the plaintiff below was not entitled under the law to recover a judgment for himself individually against the defendant below in his individual capacity or otherwise; and for the reason that whatever damage there was, if any, caused by the negligence, misconduct and fraud of the defendant below in his capacity as a director in the Capital National Bank, was recoverable alone by said Bank or the Receiver of said Bank, and not by the plaintiff below.

3rd. The court erred in refusing to give the first paragraph of the instructions requested by this plaintiff in error, defendant below, for the court to direct the jury to return a verdict in favor of the defendant below, being numbered 1, and found in the transcript on page 69.

4th. The court erred in giving the eleventh paragraph of the instructions given by the court, numbered 11th, found on page 52 of the transcript.

5th. The court erred in giving to the jury the sixteenth paragraph of its charge to the jury, numbered 16th, where he undertakes to define the actionable negligence of a director of the bank in not discovering the embezzlement of funds by the president of the bank or of the cashier, thus fixing a liability not recognized by the law fixing and defining the duties of directors of national banks, and in direct violation of the principal and requirements specified in Sections 5239 and other sections of the National Banking Act.

9 6th. The court erred in giving the seventeenth paragraph of its instructions to the jury, numbered 17th, for the same reasons as set forth in the assignment of errors concerning the giving of the sixteenth paragraph above mentioned.

7th. The court erred in refusing to give the sixth paragraph of the instructions requested by the defendant below, numbered 6th, wherein the duties and liabilities of directors of national banks are defined in accordance with the provisions of the National Banking Act.

8th. The court erred in each one of its instructions to the jury in the construction and application of the duties and liabilities of directors of national banks under the national banking act, as shown by paragraphs of the charge of the court to the jury numbered 9th, 10th, 11th, 16th and 17th.

9th. The court erred in overruling the motion for a new trial.

10th. The court erred in entering judgment against the defendant Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, for the reason that the plaintiff's cause of action, if he ever had any against her, did not accrue to him within five years

prior to the commencement of said action; and said action was barred by the statute of limitations as against said defendant.

11th. The court erred in refusing to give force and effect to the former adjudication of the claim of the said Thomas Bailey for the same cause of action against the same defendants as presented in the case herein; and, in allowing judgment to be entered in favor of the said Thomas Bailey and against the said defendants, refused to give faith and credit to the final judgment that was entered in the Circuit Court of the United States for the District of Nebraska, between the same parties and on the same cause of action, being a full and final adjudication of the same questions and cause of action involved in the present case; the error of the court therein being a direct violation of the Constitution and laws of the United States.

12th. The court erred in refusing to give the seventeenth paragraph of the instructions requested by the defendant below, numbered 17.

The plaintiff therefore prays that said judgment may be reversed and said cause of action dismissed, and that said plaintiff in error go hence without costs.

J. W. DEWEESE,
Att'y for Pl'ff in Error.

Indorsed: 13032. Charles E. Yates, *et al. v.* Thomas Bailey. Petition in Error of Louisa Hamer, Adm'x. Supreme Court of Nebraska. Filed Nov. 28, 1902. Lee Herdman, Clerk.

11–14 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Transcript in the words and figures following, to-wit:

District Court of Seward County, Nebraska.

Pleas before the District Court of the Fifth Judicial District of Nebraska in and for the County of Seward, at a term thereof begun and holden in the City of Seward, in said County and State, on the 19th day of May One Thousand Nine Hundred and Two.

Present: Honorable S. H. Sornborger, Judge. J. M. Calder, Clerk.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STEWART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

* * * * * * *

15 And afterwards, on the 16th day of March 1899, there was filed of record in the office of said Clerk a certain Amended Petition in word- and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, AMBROSE P. S. STUART, RICHARD C. OUTCALT, and ROLLO O. PHILLIPS, Defendants.

Amended Petition.

The plaintiff for this amended petition complaines of the defendants and alleges that on prior and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned the defendants acted as the directors and officers of the Capital National Bank, a corporation duly organized and doing a general banking business in the city of Lincoln, Nebraska, and as such directors had the full control and management of said bank.

That acting as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said bank to actively and actually manage and superintend the business of the same, to examine the books of said bank including loans and discounts, to examine the loans made,
to whom made, the security therefor, and when due; to see
16 that the general condition of said Bank corresponded with its
books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank, and not included in its statements, to see that the valuable effects, assets, and other matters including the cash on hand and in other banks on depositories agreed with the books of said Bank.

That the defendant- and each of them failed to perform*ed* the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers, and to those who were relatives and favorites of the defendants as officers or acting officers of the Bank.

That the Books of said Bank were out of balance, that they allowed and permitted forced balances to be made and carried on the Bank books, the deposits account was falsified, being greatly understated, the real estate, bills receivable, and deposit account each being largely inflated; that they permitted to be carried on the books of the Bank and permitted and caused to be published statements and advertisements, wherein they included as valuable assets of the bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous

notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amount of notes, bills receivable and other items, due the bank to remain past or overdue without taking steps to collect or
17 secure the same, whereby the same were lost to the bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be worthless, and of no value, and from time to time they published, permitted and allowed and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectible and part of the valuable resources and effects of said Bank when in truth and in fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and its business, and — all of which facts and circumstances the defendants, and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made state-
18 ments to the plaintiff and the public showing said Bank solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause allow and permit to be published said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent., until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said Bank became insolvent as aforesaid the said defendant permitted said Bank to continue in business and receive deposits and loans from plaintiff and others, the defendants having knowledge of such insolvency, or ought — have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting directors and of the insolvency of said Bank this plaintiff was at all time- entirely ignorant.

That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers, setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to loan, deposit and keep money in said Bank, and the plaintiff relying upon said published statements as it had the right to do, deposited and loaned his money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for these hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as he did from time to time
19 and hereafter set forth, nor would he have allowed the same to remain therein, but on account of the false statement referred to aforesaid he allowed the same to remain on deposit, when but for said false and untrue statements he would have promptly withdrawn his loans and deposits before the failure of said Bank, and that he was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said bank made, caused allowed and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement made is hereto attached and marked "Exhibit A," which said statement was made caused allowed and permitted to be made by the said defendants as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and induce- the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date caused allowed and permitted said false statements to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the State of Nebraska.

Plaintiff avers that on the 28th day of December, 1896, the said defendants and each of them acting as such directors and officers of said Bank, for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid and solvent, and to induce the plaintiff and others to do business with said Bank aforesaid made caused, allowed and permitted to be made a false statement of its resources
20 and liabilities, a copy of which statement is hereto attached, and marked "Exhibit B," and caused allowed and permitted said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska which said newspapers were of general circulation in the State of Nebraska for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank, when in truth and in fact said

Bank was not in a sound, solid, safe and solvent condition, but was wholly insolvent.

This plaintiff avers that on and between January 3rd, 1887 and January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time made, allowed, caused and permitted to be made at divers intervals false statement- of the condition of said Bank as to its resources and liabilities with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed and permitted said false statements, and each of them severally to be published in newspapers of general circulation in the city of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the state of Nebraska.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements represented that said bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business, and a safe bank in which to make deposits and loans of money, and said statements were prepared and published and were caused, permitted and allowed to be prepared and published by said defendant- for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and
21 published stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the plaintiff, and plaintiff avers that he believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time,—the exact time of which plaintiff cannot at this time state,— the said defendants had conversations with plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1893, in which said conversations said defendants represented said Bank, of which they were directors and acting directors and officers was thoroughly safe and sound, a-d believing said published statements and advertisements as aforesaid and said verbal representations so made by said defendants to be true and believing them to be true and relying upon the same, that said Bank was sound and solid and solvent and doing a flourishing and prosperous business, and said statements and advertisements showed, and represented as in said verbal statements, this plaintiff on the 11th day of October, 1892, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money, and continued to loan and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to his credit in said Bank amounting to Eleven Thousand Five Hundred, ($11,500) Dollars, money he had loaned to and deposited with said Bank.

That plaintiff loaned and deposited in said Bank the following sums and amounts upon the following dates, to-wit:

22	October	11th,	1892	$500.00
	"	11th,	1892	1000.00
	"	11th,	"	8000.00
	December	28th,	"	500.00
	"	28th,	"	500.00
	"	28th,	"	1000.00

Plaintiff avers that said statement and advertisements so published as aforesaid, and said statements as verbal-y announced to the plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue, and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated, and the resources inflated and exaggerated as hereinbefore stated. That whereas said statements and advertisements, and each of them, as well as said verbal statements made and caused, allowed and permitted to be made to the plaintiff as aforesaid, showed that said Bank was sound, solid and solvent, and doing a flourishing business, when in truth and in fact said Bank was not doing a flourishing and prosperous business, and was in fact at the time said statements and advertisements were published and verbally made, in an unsafe precarious condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said bank was well known to said defendants at the several times they made said statements and advertisements as published and as verbally made to the plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors, and acting as directors and
23 they each of them willfully negligently and recklessly for the purpose and with the intent aforesaid, made caused allowed, and permitted to be made and published said false statements and advertisements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said bank.

Plaintiff further avers that its knowledge of the condition of said bank was wholly derived from said published statements and advertisements, and by said verbal statements so made to him by said defendants and that had said statements and advertisements so published and as verbally made as aforesaid set out given the true condition of said Bank, it would have appeared, and it would have been shown that said Bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st

day of January, 1893, said bank suspended business and went into the hands of a Receiver, and that said bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and making said verbal statements by said defendants to the plaintiff as aforesaid insolvent, and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendant said it had, in said published statements advertisements, and verbal statements made as aforesaid, and that by reason thereof said Bank could not and did not pay this plaintiff any part of said sum of money loaned
24 and deposited with said Bank, except the sum of Seventeen Hundred and Twenty-Five and no/100 ($1725) Dollars, and that the remainder of said money so loaned and deposited with said Bank had been wholly lost to this plaintiff by reason of the facts hereinbefore set forth.

Plaintiff states that by reason of facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Fifteen Thousand ($15000.00) Dollars.

Wherefore plaintiff prays judgment against the defendants, and each of them for the sum of Fifteen Thousand ($15,000) Dollars, its damages, with interest thereon from January 21st, 1893 at 7 per cent. and costs of suit.

THOMAS BAILEY, *Plaintiff,*
By BURR & BURR, &
GEO. W. LOWLEY,
BIGGS & THOMAS, *Its Attorneys.*

THE STATE OF NEBRASKA, *Seward County, ss:*

Thomas Bailey being first duly sworn on his oath says that he is the plaintiff in the above and foregoing action, that he has heard read the above amended petition and knows the contents thereof, and that the facts therein contained are true as he believes, and further he saith not.

THOMAS BAILEY.

Subscribed in my presence and sworn to before me this 1st day of May, A. D., 1897.

[SEAL.] GEO. W. LOWLEY,
Notary Public.

Commission Expires May 25, 1899.

25 "EXHIBIT A."

Report of the Condition of the Capital National Bank, at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and discounts		768,601.44
Overdrafts secured and unsecured		6,217.74
United States Bonds to secure circulation		50,000.00
Stocks, securities, etc		325.00
Due from approved reserve agents		107,090.01
Due from other National Banks		17,800.33
Due from State Banks and Bankers		5,394.72
Banking house, furniture and fixtures		5,770.00
Other real estate and mortgages owned		38,716.92
Current expenses and taxes paid		14,286.28
Checks and other cash items		3,698.56
Exchange of clearing house		8,841.16
Bills of other Banks		2,355.00
Fractional paper currency, nickels and cents		298.71
Specie		26,789.50
Legal tender notes		17,431.00
Redemption fund with United States Treasurer (5 per cent. of circulation)		1,350.00
Total		$1,074,867.37

Liabilities.

Capital stock paid in		$300,000.00
Surplus fund		6,000.00
Undivided profits		21,180.75
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$356,139.33	
Demand certificates of deposit	158,545.14	
Due to other National Banks	81,574.14	
Due to State Banks and bankers	47,372.89	
		643,632.24
Note and bills rediscounted		59,054.38
Total		$1,074,867.37

STATE OF NEBRASKA, *County of Lancaster, ss:*

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowl-
26 edge and belief.

R. C. OUTCALT.

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

"EXHIBIT B."

Report of the Condition of the Capital National Bank in Lincoln, in the State of Nebraska, at the Close of Business December 28, 1886.

Resources.

Loans and discounts	$737,462.12
Overdrafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stock, bonds and mortgages	22,739.34
Due from approved reserve agents	74,068.63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real Estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other Cash items	13,742.02
Bills of other Banks	3,712.00
Fractional paper currency, nickels and cents	216.42
Specie	27,308.00
Legal tender notes	10,400.00
Redemption with U. S. Treasurer (5% circulation)	1,900.00
Total	$1,035,448.92

27

Liabilities.

Capital stock paid in		300,000.00
Surplus funds		12,000.00
Undivided profits		28,439.38
National Bank notes outstanding		45,000.00
Individual deposits subject to check	$414,962.35	
Demand certificates of deposit	40,859.66	
Due to other National Banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.94
Notes and bills rediscounted		52,090.00
Total		$1,035,448.92

STATE OF NEBRASKA, *Lancaster County, ss:*

I, C. W. Mosher, President of the above Bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct.
Attest:
C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

And afterwards, on the 15th day of April, 1899, there was filed in the office of the said Clerk a certain Demurrer in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Now comes the defendants Charles E. Yates and Ellis P. Hamer, and all other defendants and demur to the amended petition as amended by interlineation, for the following reasons;

28–34 1st. The said petition shows that this Court has no jurisdiction to try and determine the issues in said action, the petition showing that the cause is founded upon the acts of negligence of the defendants as directors of the Capital National Bank and the allegation of their duty under the National Banking Act.

2nd. The said petition does not state facts sufficient to constitute a cause of action against these defendants and in favor of the plaintiff.

F. M. HALL,
J. W. DEWEESE, &
F. E. BISHOP,
Att'ys for Def'ts.

* * * * * * *

35 And afterwards, on the 15th day of July 1901, there was filed in the office of said Clerk a certain answer in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Separate Answer of Charles E. Yates and Ellis P. Hamer to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

Now comes the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the court, each make answer for himself separately to the plaintiff's petition as amended by interlineation on the 16th day of March, 1899.

These defendants say *the* whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and
36 in the amounts stated in said amended petition, these defendants have not knowledge or information, and they therefore deny that such deposits were made.

First Defense: These defendants each for himself alleges that the Capital National Bank of Lincoln referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the Congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has ever been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

37 These defendants further say that the said cause of action set out in the plaintiff's amended petition, if he have any, is founded up- alleged facts, which, if true, constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management

of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense: These defendants further say, each for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the district court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancanster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, Thomas Bailey,

to remand said cause to the District Court from which it had
38 been removed, and which action was overruled.

That subsequently, and on or about February 9th, 1894, these defendants, together with other defendants in said cause then pending in the said United States Circuit Court, filed demurrers to the petition of the said plaintiff, which on consideration of the court were sustained, and a judgment was duly entered in favor of the said defendants for costs, amounting to the sum of $125.73; and the plaintiff's cause of action was dismissed by the said court.

That subsequently, and on or about the 13th day of February 1894, the plaintiff in said action, being the same plaintiff as in this action, sued out a writ of error and took an appeal from the ruling and judgment entered by the said Circuit Court of the United States, to the United States Circuit Court of Appeals. That such proceedings were had on the application of the plaintiff in said Circuit Court of Appeals for a reversal of the said judgment as are necessary to obtain a hearing in said Circuit Court of Appeals, and that a hearing was duly had and an opinion and judgment rendered affirming the judgment of the Circuit Court of the United States in said case; said judgment of affirmance being duly entered in the said Court of Appeals on or about the 10th day of November 1894, and adjudging also that the said plaintiff pay the costs incurred in the said appeal, amounting to the sum of $72.25.

These defendants further say that said judgments entered in the said Circuit Court of the United States for the District of Nebraska and in the United States Circuit Court of appeals in said cause, have never been set aside or appealed from, and they stand of record in

full force and effect as a final adjudication of the plaintiff's cause of action against these defendants.

39 These defendants further say that the said judgments in the said courts for costs as above stated have never been paid by the plaintiff; that said judgments for costs remain in full force and effect against the said plaintiff and in favor of these defendants.

The defendants therefore allege that the cause of action in this cause or pretended cause of action as set forth in the plaintiff's amended petition herein, has been fully adjudicated and by reason of such adjudication and the non-payment of the said judgments so entered, by the plaintiff, the defendants allege that this last cause of action is simply vexatious and an abuse of the process of this Court, and that the plaintiff is barred and estopped by reason of said judgment and the non-payment of the same, from maintaining this cause of action.

Third Defense: As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895 by said Thomas Bailey, plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rolla O. Phillips, defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bailey and against the said defendant Stuart, has not been reversed or set aside, but in due course of time executions were issued on said judgment for the collection of the same; and levies were duly made upon the property belonging to the said defendant Stuart, and said property was sold in satis-

40 faction of the said judgment rendered in favor of the plaintiff Thomas Bailey. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged on record if it has not already been so discharged, and that said judgment so taken by the said Bailey against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense: These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any,

in favor of the said bank or the receiver of said bank after his appointment, and not in favor of this plaintiff.

These defendants allege the facts to be that if the plaintiff deposited his money in said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefore under the law could only be reco-ered by the said bank in its corporate capacity or by the receiver of said
41–52 bank; and such damage when recovered would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
F. M. HALL,
FRANK E. BISHOP,
Att'ys for Said Def'ts.

STATE OF NEBRASKA, *Lancaster County, ss:*

Charles E. Yates being first duly sworn, upon his oath says that he is one of the defendants in the above entitled cause; that he has read the foregoing answer, knows the contents thereof, and that the facts therein set forth are true, as he verily believes.

C. E. YATES.

Subscribed in my presence and sworn to before me by the said Charles E. Yates, this 15th day of July, A. D. 1901.

[SEAL.] WM. B. KIRBY,
Notary Public.

* * * * * * *

53 And afterwards, on the 23rd day of August, 1901, there was filed herein a certain Reply in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt.

And now comes the plaintiff and for his reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher and Richard C. Outcalt, *and* denies each and every allegation of new matter contained in their several answers.

THOMAS BAILEY,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS, AND
L. C. BURR.

STATE OF NEBRASKA, *Seward County, ss:*

Thomas Bailey, plaintiff, being duly sworn according to
54–57 law, deposes and says that he had read the foregoing reply and knows the contents thereof and that the same are true as he verily believes.

THOMAS BAILEY.

Subscribed in my presence and sworn to before me this 23d day of August, A. D. 1901.

[SEAL.] E. J. NEWTON,
Notary Public.

* * * * * * *

58 And afterwards, on the 28th day of May, 1902, there was filed with the Clerk of said Court a certain Stipulation in words and figures following, towit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

UTICA BANK, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward county, Nebraska, hereby stipulate and agree that all of said causes shall
59 be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the Court, shall be offered and produced and the cases respectively disposed of by Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of said cases, a transcript of the testimony given on the trial of all
60–68 of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

* * * * * * *

69 And afterwards on the 19th day of June, A. D. 1902 there was filed of record in the office of said Clerk a certain Instructions to the Jury, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
v.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
v.
CHARLES W. MOSHER ET AL.

UTICA BANK
v.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
v.
CHARLES W. MOSHER ET AL.

Instructions to Jury.

70 GENTLEMEN OF THE JURY:

1st. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and

R. C. Outcalt Cashier of said Bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estates of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

Given.

2d. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants make a separate defense, and each of the defendant- in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him and to his conduct under the charges made in the respective petitions of each case.

Given.

3d. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts from the evidence relating to such charges and facts and not determine the same by inference, not founded upon evidence, conjecture or guess-work.

Given.

Defendants severally except. S. H. Sornborger, Judge.

71 4th. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petitions in the several cases, that fact would not affect any one of the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct or fraud. In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the different cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Given.

Defendants severally except. S. H. Sornborger, Judge.

Second 4th.

4th. Each of the plaintiffs above mentioned allege substantially, in the same or similar form, the same general allegations in their petitions, the principal difference in the petitions being the amount which each severally alleges it had on deposit, or had loaned to the Capital National Bank, of whom the defendants are alleged to be officers and directors, and the amount claimed in their sev-

eral petitions, and the sum- which should be credited to them as having been either paid by the Receiver of the bank at divers times, to-wit, 17%, and the amounts which are realized on the sale of the property of the former defendant in this action, Stuart, to be ratably applied, is undisputed and the several amounts, together with interest thereon to this date is as follows: The Bank of Staplehurst $13,510.96, Jones National Bank, $16,888.43, Utica Bank $8,292.92, Thomas Bailey $11,-54.69.

72 And these several sums are the amounts to be named in your verdict as the sum which the said several plaintiffs may recover against the defendants whom you may find liable under the evidence and instructions, in case only your verdict should be for the plaintiffs, or such of them as you may find in favor of.

Given.

Defendants severally except. S. H. Sornborger, Judge.

5th. Each of the several plaintiffs allege that the defendants mentioned in said several petitions were the officers and directors of the Capital National Bank, doing a banking business in the City of Lincoln, and that by reason of the statements made by such officers and published in the Nebraska State Journal, and the Evening Call newspapers alleged to be published in Lincoln, of the condition of said bank, and showing said bank to be in a solvent and prosperous condition, the said several plaintiffs were induced to, and did deposite the several sums of money above indicated to you, in said bank, relying upon said representations so published as to the solvent condition of said bank.

And the plaintiffs allege that statements of its condition showing the solvency and soundness of said bank were published at divers and sundry times from the year 1886 down to and including December 9" 1892.

And the plaintiffs severally allege in their several petitions that said statements as to the conditions of said bank were at all times during said period wholly false and untrue, and that in fact and in truth the said bank was not at any of said time or during said period solvent and in sound condition, but was in fact and in truth in an insolvent condition.

And the plaintiffs severally allege that the resources of said bank were stated in said several statements published by the said de-

73 fendants grossly exaggerated and inflated, and stated to be greater than in truth they were, and that the liabilities of said bank at all times was by said published reports made to appear less than said liabilities of said bank really were, and that much of the nominal assets of said bank, such as its Bills Receivable and Stocks and Bonds were, while represented by said reports to be assets of value, in fact worthless and uncollectible, and of little or no value. And that its liabilities were much greater than was represented in said statements so published or permitted to be published by the said defendants. That by reason of the worthlessness of said assets and by reason of the excess of the liabilities, and by reason of the mismanagement and inattention, and gross negligence of the defendants the said bank about the 21st day of January 1893 suspended busi-

ness closed its doors and was taken possession of by a Receiver. And that by reason of the premises the plaintiff lost the sums of money severally, at that time on deposit in said bank as hereinbefore set forth.

Given.

Defendants severally except. S. H. Sornborger, Judge.

6th. The defendants answering severally, each for himself, admit their relationship as officers and directors, severally, of the bank at and during the time alleged in the petition, and admit that said bank was closed by a national bank examiner, about the 23rd day of January 1893, and allege that it has been in the control of a Receiver since that time. Each of the defendant Directors, and also the defendant Walsh, denies that he signed or attested the reports of the condition of said bank referred to in said petitions and denies that he made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner alleged in the plaintiffs' said petitions. And they and each
74 of them deny every allegation of the plaintiffs' several petitions except those allegations admitted as above stated.

Given.

Defendants severally except. S. H. Sornborger, Judge.

7th. These allegations of the petitions and denials set forth in the answers constitute the issues to be tried in these cases. And the burden of proof is therefore upon the plaintiffs to show by a preponderance of the testimony the truth of the allegations contained in their several petitions. In other words the burden is upon the plaintiffs severally to show that the defendants severally published or caused to be published or participated in the publication of statements of the condition of the Capital National Bank from time to time during its existence as by the plaintiffs severally alleged; to show that the plaintiffs each for himself, or itself, relied upon the truth of said statements of the condition of said bank, and to show that such statements were untrue, that is to say that said bank was insolvent, or that its assets were not truly stated, or that liabilities were understated to such degree and extent as to impair its solvency.

Given.

Defendants severally except. S. H. Sornborger, Judge.

8th. The mere fact that a bank was insolvent at any time, or at all times, standing by itself, would not entitle the plaintiffs or any of them to recover. The mere fact that it was insolvent at any time or at all times, and that statements were published by the defendants or any of them, which were substantially false would not entitle the plaintiffs or any of them to recover. The plaintiffs, and each of them in addition to proving both the above propositions must in addition thereto proved by a preponderance of testimony that such
75 published statements of the condition of the bank came to their notice, and was relied upon by them, and that they acted in reliance upon them in making the loans to or deposits with said bank before — could recover from the defendants or either of them.

The mere fact, that other inducing causes operated together with the foregoing considerations such as the obtaining of a higher rate of interest would not render the defendants or any of them less liable, provided always that such plaintiffs had notice of and relied upon the truthfulness of the published reports.

Given.

Defendants severally except. S. H. Sornborger, Judge.

9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue.

Given.

Defendants Severally except. S. H. Sornborger, Judge.

10th. The director of a bank who publishes, or participates in the publication of a report of its condition, by such act asserts that the statements contained in such report are substantially true, and he cannot rely upon his ignorance of the true condition of the bank as a defense to an action, when he in such published reports represents the bank to be solvent, if in truth it is not solvent and its assets are fictitious or worthless, or its liabilities so much greater than
76 its assets as to render the bank insolvent.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

11th. It is not alleged by the plaintiffs and the proof does not indicate that all of the officers and directors of the Capital National Bank signed any one of the alleged public statements of the condition of the bank; it being required of the bank and its officers and directors that such statements should be verified by the oath of the President or the Cashier, and attested by at least three of the Board of Directors, subsequently it was not necessary in any one report for each, or all of the directors and officers of the bank either to sign or verify such published statements. And in the particular case of the defendant H. J. Walsh, who was as before stated to you Vice President of said Bank, it is not in evidence that at any time he signed his name to any of the published statements aforesaid.

It is alleged in the several petitions however, that each and all of said defendants at divers and sundry times, either as officers and directors, made out, signed and published, or caused to be made out signed and published the statements in question.

You are instructed in that behalf, that it is not necessary in order to create a liability of any one of the defendants, for the plaintiffs to show that any such director or officer actually with his own hand signed or caused to be published the statements alleged to have been published. It is sufficient if the plaintiffs have shown that such officer or director participated in making and publishing the said statements.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

12th. In determining whether or not the defendant directors or officers did in fact participate in any or all of the statements
77 alleged, or shown to have put forth and published, besides considering any testimony, if any, which goes directly to show that such director or officer personally signed the same, you are at liberty to take into consideration the length of time such officers or director- had been in the service of the bank in such capacity at the time of any particular publication, the opportunities which he had for knowing the course of events in the bank, and of knowing that the bank officers and directors were issuing statements of the condition of the bank and causing the same to be published in the public newspapers, and consider from all these facts and circumstances taken together with all the other testimony touching upon the same, whether or not he in fact participated in and assented to the issuance and publication of such statements.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

13th. And although you should find from the testimony that any particular director or officer of said bank did not himself directly cause to be issued and published the statements concerning the condition of said bank, yet if you should find that at the time such statements were being published in the public press, such director or officer was a resident of the city of Lincoln, was in a condition of health to be about giving his ordinary attention to business, and was not absent from home, that is absent from the city of Lincoln, such facts should be taken into consideration by you, together with the other evidence and circumstances in the case in determining whether or not that officer or director knew of and participated in the issuance and publication of any or all of the statements of the condition of said bank.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

78 14th. By assets of a bank are meant all that class of valuable property pertaining to and belonging to the bank, including its money, and its bonds, its real estate, its accounts of deposit with other banks and bankers, its Bills Receivable and its overdrafts. But a worthless o erdraft, Bills Receivable or account, which as we commonly understand the term, is not collectible and against persons shown to be insolvent is not an asset of the bank.

The liabilities of a bank, generally speaking, consists of the items of account which it owes to other people including its deposits whether upon certificate or open account. Whether a bank is solvent or insolvent at any particular time depends upon whether its available assets as before defined, are sufficient in amount to meet its liabilities. A bank is not insolvent merely because upon any particular day, or at any particular time it should not have sufficient money or cash items of account to immediately pay all of its liabilities, but is only insolvent when all its available and good assets are insufficient to pay all its liabilities.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

15th. There has been testimony offered tending to show that the names of accounts in the books were not always the same as the names of the accounts in the published statements of the affairs and concerns of the bank.

In that behalf you are instructed that a mere change in the name of an account, so long as the account and its nature is not actually falsified and made to appear different from what it really is, is not such a misrepresentation as can be complained of. In order to be a material misrepresentation it must be such a misrepresentation of the assets, as before defined, and of the liabilities of the
79 bank as to misrepresent the real and actual condition of the bank.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

16th. You are instructed that proof that a President or Cashier misappropriated or embezzled funds of the bank, or falsified the books of account is not of itself sufficient to establish actionable negligence against the directors who have not participated therein, but if such embezzlements or misappropriations or falsifications are of such great extent, and are of such long continuance as would have, upon reasonable examination, challenged the attention of an ordinarily prudent business man then you would be justified in finding that the directors were charged with notice of such misappropriation or embezzlements and falsifications.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

17th. It is the duty of the bank officers and directors to give to the affairs of a bank such reasonable care and supervision and oversight as ordinary men of business prudence exercise in the supervision and care of their own business affairs and concerns which they delegate to the immediate administration of others.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

18th. You are instructed that the credibility of witnesses, and the weight to be given to the testimony of each is a matter exclusively for the jury. The jury have the right to determine from the appearance of the witness on the stand, their manner of testifying,
80 their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial find which witnesses are the more worthy of credit, and to give credit accordingly.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

19th. In considering the weight to be given to the testimony of any witness it is proper for you, and you should take into consideration among the other matters heretofore referred to in the foregoing instructions, the interest of the witness if any in the event of the suit, their temper or feeling of bias, if any has been shown by them in their testimony, and their means of information as to the subject concerning which they testify, and to give such credit to the

testimony of each witness as under all the circumstances such witnesses to be entitled to.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

20th. By the preponderance of the testimony the court means the greater weight of evidence; that is to say, the preponderance of evidence upon any given issue, where the evidence is conflicting upon such issue, is that which, upon consideration of all the facts and circumstances proved at the trial produced the greater impression of truth upon the mind.

Given.

Defendants Severally Except. S. H. Sornborger, —.

21st. The preponderance of evidence in a case is not however, alone determined by the number of witnesses testifying to a
81 particular fact or state of facts. In determining upon which side the preponderance of testimony is, the jury should take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify, their conduct and demeanor while testifying, their interest or lack of interest if any in the result of the suit, the probability or improbability of the accuracy and certainty of their memory of the events of and concerning which they testify, and in view of all these, when taken in connection with all the other testimony in the case, or upon an issue in the case determine upon which side is the preponderance or weight of the evidence.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

1st. A director or executive officer of a National Bank is responsible for the making and publication of a false report of its financial condition, tho' he did not personally make and publish such statement, if he in any manner participated in the making or publication thereof. A director of a National Bank is presumed to know its true condition and that the law requires true statements of its affairs to be made and published by the Bank from time to time, and if one has been a director or executive officer of such a bank for a long period of time he is presumed to have knowledge of the making and publishing of the statements of its condition, *and the burden is cast upon him to overcome this presumption by competent evidence.*

Requested by plaintiffs.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

2nd. The jury are instructed that inasmuch as the law required that all reports made by a national bank to the Comptroller of the Currency shall be published at the expense of the bank,
82 in a newspaper at the place where the bank is established, you have a right to consider such published reports as have been introduced in evidence in this action purporting to have been signed, and whose names appear in such published reports, as having

been authorized by such defendants, so appearing to have signed the same.

Requested by plaintiffs.

Given.

Defendants Severally Except. S. H. Sornborger, Judge.

22nd. You are instructed that if the evidence under the instructions of the court justify it, you may, in each case return a verdict against all of the defendants, or if it does not justify a verdict against all of the defendants, in any or all of such cases, your verdict should be returned only against such defendants as you may find liable under the evidence and instructions. If under the evidence and instructions of the court you should find against any or all of the plaintiffs, you should return a verdict according to such findings.

But you are at liberty, if the evidence so justifies it to omit from either or all of your verdicts, in either or all of said cases, the name of any defendant whom in your judgment is not, under the evidence — instructions of the court liable in the premises.

Three blank verdicts in each case will be furnished you as follows:

One of which in each case is a verdict in favor of the defendants.

One of which in each case finds against all of the defendants.

The other of which in each case in favor of the plaintiffs, has in its blanks which you may fill in with the names of such of the defendants as you may find against.

83 23d. For your convenience in making up your verdicts the court here states to you the full name of each of the defendants named in the several cases as follows:

Charles W. Mosher, George M. Walsh and Warren W. Walsh Administrators of the estate of Homan J. Walsh deceased; Charles E. Yates; Richard C. Outcalt; Louisa Hamer executrix of the estate of Ellis P. Hamer deceased; and David E. Thompson.

24th. You are instructed and you will bear in mind that in case of The Bank of Utica *v.* Mosher, *et al.* and in the case of Thomas Bailey *v.* Mosher, *et al.* David E. Thompson is not a party defendant, and your verdict in those two cases could not be against said Thompson, and in the form of verdicts furnished you, if you should find against all of the defendants as before suggested is omitted the name of Thompson in those two cases. He is, however, a defendant in the other two cases in this action.

25th. At the request of the defendants Walsh Administrators there is submitted for your consideration three questions in each of these cases, to which you should return an answer "Yes" or "No" to each question in each case. The first question is

Did Homan J. Walsh ever qualify or act as a Director of the Capital National Bank?

The second question is

Did Homan J. Walsh ever sign any report of the condition of the Capital National Bank, mentioned in pleadings or shown in the evidence.

Third.

Is Homan J. Walsh shown by the evidence to have actively par-

ticipated in the making of any report of the condition of
84 the Capital National Bank mentioned in the pleadings or shown in evidence.

26th. You are instructed that the second of said questions should be answered "No" since the court has already instructed you that there is no evidence that the said Walsh ever signed any of the reports of the condition of the Capital National Bank.

The First and Third of said questions you will answer "Yes" or "No" according as you shall find from a consideration of the evidence upon either and both of said questions.

27th. When you shall have agreed upon your verdict your foreman should sign the four verdicts (one in each case) conformable to your findings, unless you should find in favor of the plaintiffs and against a part only of the defendants. On the other hand, if you should find in favor of the plaintiffs and against a part only of the defendants it will be necessary for you to insert in the blank left in the verdicts the full name of the defendants against whom you find.

You will also, as before instructed, make the special findings before referred to, and your foreman will sign the four special verdicts, and when you have agreed upon your verdict, and agreed upon the answers to the First and Third questions of the special verdict in each of these cases, you will return with the same into court.

S. H. SORNBORGER, *Judge.*

85 And afterwards, on the 19th day of June 1902, there was entered of record herein the following, to-wit:

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

And now on this June 19, 1902, comes the Court, the above named jurors, the parties to this action, and their respective attorneys, pursuant to adjournment, and the trial proceeds. And said jurors having heard all the testimony, the argument of counsel, the instructions of the Court, retired in charge of the sheriff for deliberation, and on the same day returned into open court the following verdict in writing, and the following special findings in writing on special interrogatories requested on the part of the defendants.

THE STATE OF NEBRASKA, *Seward County, ss:*

May Term, A. D. 1902, to-wit, May 19, 1902.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

We, the jury in this case, being duly impaneled and sworn, do find for the plaintiff, and against the defendants, and we assess the amount of plaintiff's recovery at the sum of ($11054.69) Eleven

Thousand Fifty-Four Dollars and Sixty-Nine Cents, against each and all of the defendants.

J. J. ENDICOTT, *Foreman.*

District Court, Seward County, Nebraska.

86 THOMAS BAILEY
vs.
C. W. MOSHER ET AL.

The Jury will answer the following questions to be signed by your foreman.

1. Did Homan J. Walsh ever qualify or act as a director of the Capital National Bank?

Answer. No.

J. J. ENDICOTT, *Foreman.*

2. Did Homan J. Walsh ever sign any report on the condition of the Capital National Bank mentioned in the pleadings or shown in evidence?

Answer. No.

J. J. ENDICOTT, *Foreman.*

3. Is Homan J. Walsh shown by the evidence to have actively participated in the making of any report of the condition of the Capital National Bank mentioned in the pleadings or shown in evidence?

Answer. Yes.

J. J. ENDICOTT, *Foreman.*

When a mistake has been made in writing a word in the findings, shall we draw a pen through the error in order to make the correction?

Answer. If you have mistakenly written a wrong or unintentional word in a finding it is proper for you to draw a pen through it & insert instead of it the word you desire to return as your answer.

S. H. SORNBORGER, *Judge.*

87 And afterwards, on the same day there was filed in the office of said Clerk the following Requests, to-wit:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST
vs.
CHARLES W. MOSHER ET AL.

JONES NATIONAL BANK
vs.
CHARLES W. MOSHER ET AL.

UTICA BANK
vs.
CHARLES W. MOSHER ET AL.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Instructions Requested by Defendants Thompson, Yates, Hamer, and Walsh.

1. The jury are instructed that these actions were brought against C. W. Mosher, President of the Capital National Bank, and R. C. Outcalt, Cashier of said Bank, and against D. E. Thompson, Charles E. Yates, Ellis P. Hamer and R. O. Phillips as directors of said bank, and Homan J. Walsh as Vice President of said bank, the defendants Walsh, Hamer and Phillips have since died; and the estates of Hamer and Walsh are represented in these actions by their administrators. No revivor of the action against R. O. Phillips has been had, and consequently you can not find any verdict against Phillips.

2. All of the foregoing entitled cases are submitted to you for determination at one trial and on the same evidence, so far as such evidence is applicable to the respective cases and to the respective defendants. Each of the defendants makes a separate defense, and each defendant in each of the cases can only be bound or affected in any way by such evidence as may be applicable to him and to his conduct under the charges made in the respective petitions of each case.

3. The jury are instructed that the Capital National Bank was organized under the National Banking Act; such act provided
88 that no less than five persons from among the stockholders of such bank should be elected to act as directors of the bank. As the act was originally passed such directors were required to manage and carry on the banking business in the bank of which they were directors, but under the law as amended in 1874, and as appears in Section 5136 of the National Banking Act, the directors of the Capital National Bank had the power to appoint a President and Cashier to act as the officers and agents of said bank,

and authorize them to carry on the active management of the bank's business.

You are instructed that the oath which the national bank instructor has been required to take under the Act as it first was drawn, to the effect that he would not knowingly violate, or willingly permit to be violated any of the provisions of the National Banking Act, was so changed by the amended Act of 1874, by inserting the words: "so far as the duties devolved on him."

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh Estate & the Def't directors. J. H. Sornborger, Judge.

4. The jury are further instructed that the National Banking Act under which the Capital National Bank was acting during the time alleged in the plaintiff's petitions, it was required to make not less than five reports for each year to the Comptroller of the Currency, and have the same published in a newspaper at the place where the bank was doing business, such report was required to be sworn to by the President or Cashier of the Bank and attested by at least three directors. The assets and liabilities of the bank were required to be listed under the proper heads and according to the form prescribed by the Comptroller, and you are instructed that the reports thus required to be
89 made do not purport to give the value of the assets, nor certify to the solvency of the bank, or the makers of its paper, but simply set forth the resources and liabilities of the bank.

Refused.

Excepted to by J. W. Deweese, Att'y for Walsh Est. & the Def't directors.

5. The jury are instructed that reports of the assets and liabilities of the bank made to the Comptroller and published in a newspaper are not an act of the officers and whole directory of the bank, but simply the act of such officers, who made and swore to the same, and such directors as attested such report; and any director who did not attest such report is not held responsible for anything stated therein.

Refused.

Excepted to by J. W. Deweese, Att'ys for Def'ts Walsh Estate & directors. S. H. Sornbirger, Judge.

6. The jury are instructed that if you find from the evidence introduced in reference to any of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant.

Refused.

Exception by J. W. Deweese, for Walsh Estate & the directors. S. H. Sornborger, Judge.

7. If the jury find that the defendant Mosher made a false credit

to the account of the State Treasurer, and made other false entries and manipulations of accounts in the books of the bank, and
90 *and* wrongfully issued certificates of deposit for his own interest and benefit without the knowledge or consent of the directors, which could not by ordinary care and attention in the usual course of the official duties of directors be discovered, then you are instructed that the directors would not be responsible, either collectively or individually for the fact of such false entries and manipulations of the bank's account.

If false entries and manipulations were had and done by defendant Mosher in the use of the books of the bank, that fact would not carry notice to the directors. It would be misuse of words and inconsistent with honest thought to say that because entries were made to conceal the real facts in the books, would bring notice to the directors.

False entries and manipulations of figures in the books purposely kept in the manner to conceal the truth, do not either in law or morals, carry knowledge of such facts. If the defendant Mosher had knowledge of the truth, even though he was president of the bank, his knowledge of his own frauds perpetrated for his individual purposes could not be attributable to the directors of the bank.

Refused.

Excepted to by J. W. Deweese for Walsh Estate & Def't directors.
S. H. Sornborger, Judge.

8. The jury are further instructed that the defendant Mosher, being president of the bank, like any other agent of a corporation, could bind the bank within the scope of his authority; but this principle of law has no application to a case where the president of the bank goes outside of his authority and acts for himself in his own interest and adversely to the interest of the bank of which he is president.

If Mosher acted in fraudulent transactions for his own interest and against the interest of the bank, such act is not within the operation of the rule that the principal for which he is agent is bound by his act; for two reasons:

91 First. In such a case he would be acting for the interest of himself and not for his principal, the bank;

And secondly, he would not communicate to his principal an act of fraud which he was interested in concealing; consequently, it is both unjust and unreasonable and contrary to law to say that the directors of the bank or the bank itself should be bound by such acts.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese.
S. H. Sornborger, Judge.

9. The jury are instructed that if you find in these cases that the Comptroller of the Currency furnished printed blanks on which reports were to be made, and the blanks thus printed set forth certain headings and titles under which the assets of said bank were to be listed; and you further find that the accounts in the bank's books were not kept under the same headings and the titles printed in said blanks, and that consequently some of the items kept in the bank's

books had to be reclassified in order to come under the proper heading as printed in the blanks for the making of said reports, then you are instructed that such reclassification of the assets and liabilities of the bank would not in itself make such report false, even if it did not literally agree with the amounts stated under the headings and totals as kept in the bank's books. In other words, if the account were reclassified in order to properly fit the headings of the blank report, this in itself was not the making of a false report. And if when such report was called for, the person or persons making and attesting it, entered under the headings and titles of the prescribed form, a true statement of the bank's assets and liabilities on the day called for, such report fulfilled the demands of the law, and would not be a false report.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese.
S. H. Sornborger, Judge.

92 10. You are further instructed that a report is not necessarily false, even though it might state an account differently from what it appeared on the books of the bank. If you find that in the making of a report of the resources and liabilities of the bank, the resources were inflated and stated to be larger than they appeared on the bank's books, and the liabilities of the bank were also equally inflated above what they appeared on the bank's books, then you are instructed that such a statement is not material in such a sense as to affect the value or standing of the bank, for the reason that the liabilities of the bank are increased as much as the resources are increased; consequently the bank is in no better condition, and appeared to be in no better condition, where both sides are thus inflated, than it was had there been no inflation on either side of the bank's accounts.

Refused.

Excepted to by Def't, directors & Walsh Estate, J. W. Deweese.
S. H. Sornborger, Judge.

11. The jury are instructed that if you find that one or more of the defendants named in each of said cases have been guilty of negligence, misconduct and fraud, charged in said petitions in the several cases, that fact would not affect any one of the other defendants, nor make such other defendants, or any one of them guilty of such negligence, misconduct and fraud.

In other words, although you may believe from the evidence that one of the defendants named had done and committed or neglected the things charged in the petitions in the several cases under the proof rendered, yet you are instructed that the negligence and misconduct and fraud of each defendant can be attributed to no one of the other defendants without proof that such other defendant, or defendants participated therein.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese.
S. H. Sornborger, Judge.

93 12. The jury are further instructed that proof that the president or cashier misappropriated or embezzled the funds

of the bank, is not of itself sufficient to establish actionable negligence against directors who are not shown to have participated therein.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

13. The jury are instructed that the law under which the said bank was organized and operated, provided for bank examiners to be appointed by the Comptroller of the Currency, whose duty it was to examine and make a full and detailed report of the condition of the bank to the Comptroller of the Currency, and the evidence shows in this case that such examinations of the bank were made from time to time, by the regular government bank examiner, during the entire existence of the Capital National Bank.

Refused.

Excepted to by Def't directors & Walsh estate, J. W. Deweese. S. H. Sornborger, Judge.

14. The jury are instructed that the evidence in this case shows that the defendant Mosher was the real party in interest in the management and control of the Western Manufacturing Company; and if you believe from the evidence that he used the notes of the Company in borrowing money, or in endorsing such notes as President of the bank for rediscount, for his own interest and without the knowledge, consent and authority of the Board of Directors of the bank, then you are instructed that the bank would not be liable on such notes.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

94 15. The jury are instructed that if you find that any notes were issued by the Western Manufacturing Company and endorsed and negotiated by defendant Mosher as President of the Bank, then you are instructed that the bank would not be liable on any of such notes that were not duly and legally protested according to law; and the allowance of claims on such illegal notes by the Receiver of said bank is immaterial in the consideration of this case, and does not change the fact that the bank was not liable on the same.

Refused.

Excepted to by Def't Directors and Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

16. The jury are instructed that in each of the above entitled cases, the cause of action in each, so far as the published reports are concerned, is based upon the two reports set out in the petitions, to-wit: The report of December 28, 1886, and the report of December 9, 1892.

Refused.

Excepted to by Def't directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

17. The jury are further instructed that if any liability ever existed against any of the defendants on account of the making and

publishing of the report of December 28, 1886, such liability is barred by the statute of limitations, and no recovery can be had in this action on account thereof.

Refused.

Excepted to by def't directors and Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

18. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you are not to arrive at any conclusion or determine any fact by mere conjecture or speculation; and you
95 are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such fact from the evidence relating to such charges and facts; and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors and Walsh Estate. S. H. Sornborgor, Judge.

19. The jury are instructed that Homan J. Walsh, who was vice-president of the said bank, never signed any of the reports to the Comptroller which were published in the newspapers; and you are therefore instructed to find a verdict in his favor, as he is not liable for anything stated in such reports.

Refused.

Excepted to by Defendant directors & Walsh Estate, J. W. Deweese. S. H. Sornborger, Judge.

20. The jury are instructed that in considering the various charges and allegations made against each defendant in the several cases submitted to you, you arr not — arrive at any conclusion or determine any fact by mere conjecture or speculation; and you are further instructed that the burden of proof is upon the plaintiff to establish the facts alleged against any defendant in these several actions; and you must determine such facts by the positive proof relating to such charges and facts, and not determine the same by inference, conjecture or guess-work.

Refused.

Excepted to by Def't Directors & Walsh Estate, J. W. Deweese. S. H. Sornborger.

96 And afterwards, on the 19th day of June, 1902, there was filed herein the following paper, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.

You are instructed that under the issues in this case and the evidence that *have* been ad-uced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendants George M. Walsh and Warren W. Walsh, as administrators of the Estate of Homan J. Walsh, deceased; and you are therefore instructed to return a verdict in favor of said defendants George M. Walsh and Warren W. Walsh, as administrators of the Estate of Homan J. Walsh, deceased.
deceased.
Refused.
Excepted to by Def't Walsh, Adm. J. W. Deweese. S. H. Sornborger, Judge.

And afterwards, on the 19th day of June, 1902, there was filed herein the following paper, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.
97-115 You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Elizabeth Hamer, administratrix of the Estate of Ellis P. Hamer, deceased; and you are therefore instructed to return a verdict in favor of the said defendant Elizabeth Hamer, administratrix of the Estate of Ellis P. Hamer, deceased.
Refused.
Excepted to by Def't Hamer, Admi'x, J. W. D. S. H. Sornborger, Judge.

And afterwards, on the 19th day of June 1902, there was filed herein the following paper, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

1. The jury are instructed in this case that the defendants are not jointly liable to the plaintiff, and each defendant has made a separate defense to the claim made in the plaintiff's petition.
You are instructed that under the issues in this case and the evidence that has been adduced on the trial thereof, the plaintiff is not entitled to recover a verdict against the defendant Charles E. Yates;

and you are therefore instructed to return a verdict in favor of the said defendant Charles E. Yates.

Refused.

Excepted to by Def't Yates. J. W. Deweese. S. H. Sornborger, Judge.

* * * * * * *

116 And afterwards, on the 21st of June, 1902, there was filed in the office of said clerk a certain Motion in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Motion for New Trial.

Now comes the defendant Louisa Hamer, Administratrix of the estate of Ellis P. Hamer, deceased, and moves the court to set aside the verdict rendered by the jury against her in the above entitled cause and grant a new trial therein, for the following reasons;

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions in-
117 volved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant intestate the plaintiff is not, as a matter of law, entitled to recover.

3rd. The damages alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank or by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for self individually.

4th. The court erred in taking jurisdiction of said cause and the hearing of proof under the allegations of the plaintiff's petition over the objection of this defendant, for the reason that the duties and liabilities of this defendant's intestate as director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant'-intestate was acting in the capacity of director and the damage growing out of mismanagement negligence or fraud of this deefndant's intestate as charged in said petition, if such existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national

banking act and the liabilities of said defendant's intestate under said act as director of said bank.

5th. The court erred in failing to give faith and credit to the judgment of the United States Court, rendered in this case.

6th. The court erred in refusing to receive in evidence the
118 record of the former adjudication of the plaintiff's claim against the defendant.

7th. The petition in said cause does not state a cause of action against this defendant.

8th. For errors of law occurring at the trial and excepted to by the defendant.

9th. The verdict is contrary to law.

10th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

11th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

12th. The court erred in refusing to give instruction numbered 3, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

14th. The court erred in refusing to give instruction numbered 5, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

17th. The court erred in refusing to give instruction numbered 8, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 12, requested by this defendant.

119 22d. The court erred in refusing to give instruction numbered 13, requested by this defendant.

23rd. The court erred in refusing to give instruction numbered 14, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 15, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 16, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

28th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

29th. The court erred in refusing to give instruction numbered 20th, requested by this defendant.

30th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

31st. The court erred in giving the second fourth instruction on its own motion, to the jury, numbered "second 4.

32d. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

33d. The court erred in giving the sixth instruction on its own motion, to the jury, numbered 6.

34th. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

34th. The Court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

35th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

36th. The court erred in giving the tenth instruction on its own motion to the jury, numbered 10.

120 37th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

38th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

39th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

40th. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 13.

42d. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

43d. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

44th. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

45th. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

46th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

47th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

48th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

49th. The court erred in giving the first instruction requested by plaintiff, numbered 1st.

50th. The court erred in giving the second instruction requested by plaintiff, numbered 2nd.

J. W. DEWEESE,
Attorney for said Def't.

And afterwards, on the 21st day of June, 1902, there was filed in the office of said Clerk a certain Motion in words and figures following, to-wit:

121 In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
CHARLES W. MOSHER ET AL.

Motion for New Trial.

Now comes the defendant Charles E. Yates and moves the court to set aside the verdict rendered by the jury against him in the above entitled cause and grant a new trial therein, for the following reasons:

1st. That said cause of action had been duly and legally removed to the federal court, on account of the federal questions involved, as shown in the plaintiff's petition; and this court had no jurisdiction or power under the law to proceed further with the trial of said cause.

2nd. The court erred in the admission of any testimony over the objection of this defendant, for the reason that under the cause of action set forth in the plaintiff's petition, being one to recover damages on account of the negligence, misconduct and mismanagement of the bank on the part of this defendant the plaintiff is not, as a matter of law, entitled to recover.

3rd. The damage alleged in the plaintiff's petition, if any existed on account of the charges made in said petition, could only be recovered by the bank by the receiver, and ratably distributed among all the creditors and stockholders of said bank, and could not be recovered by the plaintiff for himself individually.

4th. The court erred in taking jurisdiction of said — and the hearing of proof under the allegations of the plaintiff's petition over the objection of the defendant, for the reason that the duties and liabilities of this defendant as a director of the Capital National Bank are governed and controlled by the national banking act, under which said bank was organized, and for which this defendant was acting in the capacity of a director; and the damage growing
122 out of the mismanagement negligence or fraud of this defendant as charged in said petition, in the same existed, would not accrue to this plaintiff, but would be governed and controlled by the law governing the management of the said bank under the national banking act and the liabilities of said defendant under said act as a director of said bank.

5th. The court erred in failing to give full faith and credit to the judgment of the United States Court, rendered in this case.

6th. The court erred in refusing to receive in evidence the record of the former adjudication of the plaintiff's claim against the defendant.

7th. The petition in said cause does not state a cause of action against this defendant.

8th. For error of law occurring at the trial and excepted to by this defendant.

9th. The verdict is contrary to law.

10th. The verdict is contrary to the evidence and is not supported by sufficient evidence.

11th. The court erred in refusing to give instruction numbered 1, requested by this defendant.

12th. The Court erred in refusing to give instruction numbered 3, requested by this defendant.

13th. The court erred in refusing to give instruction numbered 4, requested by this defendant.

14th. The court erred in r-fusing to give instruction numbered 5, requested by this defendant.

15th. The court erred in refusing to give instruction numbered 6, requested by this defendant.

16th. The court erred in refusing to give instruction numbered 7, requested by this defendant.

17th. The court erred in refusing to give instruction num-
123 bered 8, requested by this defendant.

18th. The court erred in refusing to give instruction numbered 9, requested by this defendant.

19th. The court erred in refusing to give instruction numbered 10, requested by this defendant.

20th. The court erred in refusing to give instruction numbered 11, requested by this defendant.

21st. The court erred in refusing to give instruction numbered 12, requested by this defendant.

22d. The court erred in refusing to give instruction numbered 13, requested by this defendant.

23d. The court erred in refusing to give instruction numbered 14, requested by this defendant.

24th. The court erred in refusing to give instruction numbered 15, requested by this defendant.

25th. The court erred in refusing to give instruction numbered 16, requested by this defendant.

26th. The court erred in refusing to give instruction numbered 17, requested by this defendant.

27th. The court erred in refusing to give instruction numbered 18, requested by this defendant.

28th. The court erred in refusing to give instruction numbered 19, requested by this defendant.

29th. The court erred in refusing to give instruction numbered 20th, requested by this defendant.

30th. The court erred in giving the third instruction on its own motion, to the jury, numbered 3.

31st. The court erred in giving the second fourth instruction on its own motion, to the jury, numbered second 4.

32d. The court erred in giving the fifth instruction on its own motion, to the jury, numbered 5.

124 33d. The court erred in giving the sixth instruction on its own motion to the jury, numbered 6.

34th. The court erred in giving the seventh instruction on its own motion, to the jury, numbered 7.

35th. The court erred in giving the eighth instruction on its own motion, to the jury, numbered 8.

36th. The court erred in giving the ninth instruction on its own motion, to the jury, numbered 9.

37th. The court erred in giving the tenth instruction on its own motion, to the jury, numbered 10.

38th. The court erred in giving the eleventh instruction on its own motion, to the jury, numbered 11.

39th. The court erred in giving the twelfth instruction on its own motion, to the jury, numbered 12.

40th. The court erred in giving the thirteenth instruction on its own motion, to the jury, numbered 13.

41st. The court erred in giving the fourteenth instruction on its own motion, to the jury, numbered 14.

42d. The court erred in giving the fifteenth instruction on its own motion, to the jury, numbered 15.

43d. The court erred in giving the sixteenth instruction on its own motion, to the jury, numbered 16.

44th. The court erred in giving the seventeenth instruction on its own motion, to the jury, numbered 17.

45th. The court erred in giving the eighteenth instruction on its own motion, to the jury, numbered 18.

46th. The court erred in giving the nineteenth instruction on its own motion, to the jury, numbered 19.

47th. The court erred in giving the twentieth instruction on its own motion, to the jury, numbered 20.

48th. The court erred in giving the twenty-first instruction on its own motion, to the jury, numbered 21.

125 49th. The Court erred in giving the first instruction requested by plaintiff, numbered 2nd.

50th. The court erred in giving the second instruction requested by plaintiff, numbered 2nd.

J. W. DEWEESE,
Att'y for said Def't.

* * * * * * *

126 And afterwards, on the 21st day of July, A. D. 1902, there was had herein the following order of Court, to-wit:

In the District Court of Seward County, Nebraska.

No. 1794.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 21st day of July, A. D., 1902 it being a day of the regular May 1902 term of the District Court, this cause came on for hearing on the motion of the defendants George M. Walsh and Warren W. Walsh as administrators of the

estate of Homan J. Walsh, deceased, for judgment in their favor on the special findings of the jury, notwithstanding the general verdict of the jury against them. And the Court being fully advised in the premises sustains said motion to which the plaintiff excepts.

And thereupon and on said same day this cause came on further to be heard on the separate motions for new trial of defendants Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louisa Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and the same being argued and submitted to the Court, and the Court being fully advised in the premises, on consideration thereof does overrule each and all of said defendants' motions for new trial, to which said defendants severally except.

It is therefore considered and adjudged by the Court that the defendants George M. Walsh and Warren W. Walsh as administrators of the estate of Homan J. Walsh, deceased, go hence without day.

It is therefore considered and adjudged that said defendants Walsh as administrators &c., recover judgment against pl'ff, for his costs.

127 It is further considered and adjudged that the plaintiff recover from the defendants Charles E. Yates, Charles W. Mosher, Richard C. Outcalt and Louise Hamer as executrix of the last will and testament of Ellis P. Hamer, deceased, and each of them, jointly and severally the sum of $11,054.69 with 7% interest from this date, and costs herein taxed at $——.

Defendants are allowed forty days from the rising of the court in which to settle bill of exceptions.

It is furthered ordered that no execution issue on this judgment until after sixty days from date.

And afterwards, on Aug. 4., 1902, the following motion was made herein, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
C. W. MOSHER ET AL.

Now comes the defendants and move the court to correct the verdict rendered in the above entitled cause, and to correct the judgment rendered therein, so far as the same relates to the amount of recovery, and in this case to correct the judgment so that the amount of the judgment with interest to April 21, 1902, will be the sum of $8,573.22 for the reasons:

1st. The amount of the verdict was not determined by the jury but was simply furnished to the jury by the plaintiff's counsel and the court, subject to be corrected afterward, according to the fact, if the same was wrong, as set forth in the affidavit hereto attached and made part hereof.

J. W. DEWEESE &
H. F. ROSE,
Att'ys for Def'ts Thompson, Yates, and Hamer.

128 In the District Court of Seward County, Nebraska.

THOMAS BAILEY
vs.
C. W. MOSHER ET AL.

STATE OF NEBRASKA, *Lancaster County, ss:*

H. F. Rose and J. W. Deweese being duly sworn, say that they were attorneys for the defendants in the above entitled cause.

That counsel for the plaintiff asked the court to instruct the jury that if they found for the plaintiff to return a verdict in favor of the plaintiff for the amount which the plaintiff had figured up as the correct amount in case the jury decoded for the plaintiff. As the correct figuring of the amount of this verdict on which judgment should be rendered, involved a good deal of work and time, it was announced in open court by the court in the presence of the jury and to the attorneys on both sides of the controversy, that he himself would write *in* the amount which the plaintiff had furnished as the correct amount, into the verdict for the jury to return in case they found for the plaintiff, and that such amount could be corre*t*ced or changed later on if it was incorrect, and after the defendants had had time and opportunity to figure over the claims, with interest, and the credits to be deducted, and determine whether the amount so furnished by the plaintiff's counsel to the court was correct or not.

Affiants further say that they have had no sufficient time to make the proper figuring of the amount that should be entered into the verdict; but *they* they have had the claims with credits and interest, carefully and properly figured since, and find that the amount

129 entered in the verdict in this case is incorrect and excessive, and that judgment was entered by the court on July 21, 1902 on the verdict rendered for $11,054.69 whereas the true amount that the plaintiff would be entitled to recover, if at all, with interest at 6%, was and is the sum of $8,573.22.

H. F. ROSE.
J. W. DEWEESE.

Sworn to before me and subscribed to in my presence by J. W. Deweese & H. F. Rose this Aug. 2, 1902.

[SEAL.] WM. B. KERBY,
Notary Public.

And afterwards, on September 24th, 1902, there was filed with the Clerk of said Court, Bill of Exceptions herein, consisting of Vol. I, Vol. II, Vol. III, the same being herewith transmitted.

And afterwards, on the 22nd day of October, being a day in the regular May, 1902, term of said District Court the following Order of the Court was had herein, to-wit:

In the District Court of Seward County, Nebraska.

JONES NATIONAL BANK
v.
MOSHER ET AL.

STAPLEHURST BANK
v.
MOSHER & Others.

UTICA BANK
v.
MOSHER & Others.

BAILEY
v.
MOSHER & Others.

Order for Remittitur.

It having been made to appear by Computations that the verdicts heretofore found by the jury in the above several cases was & are each excessive, and that the true sums due upon each several
130 claim, with interest was severally as follows:

To the	Jones National Bank	$16,444.63
" "	Staplehurst Bank	13,163.54
" "	Utica Bank	8,111.29
" "	Thomas Bailey	9,682.37

And counsel for all the parties in said causes having agreed that the foregoing are true computations, severally, and should be substituted, in the place of the sums ascertained by the jury & included in the several verdicts, Now therefore,

It is ordered that plaintiffs may and they are hereby ordered to file a remittitur in each of said several cases, of the difference between the amount, severally, above stated and the amount named in the verdict, and that thereupon the Clerk may enter judgment, in pursuance of the verdict, in each of said cases for the amount- above severally set forth.

S. H. SORNBORGER, *Judge.*

There was also entered of record of the same day the following Journal Entry, to-wit:

In the District Court of Seward County, Nebraska.

No. 1794.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

Be it remembered, that on this 22nd day of October, 1902, being a day in the regular May, 1902, term of the District Court, this cause came on for hearing on the motion of Charles E. Yates and Louisa Hamer, as executrix of the last will and testament of Ellis P. Hamer, deceased, to correct and amend the judgment heretofore entered in this cause.

And it appearing to the Court that the amount of the verdict and judgment in this cause is excessive, and that the amount
131 thereof should be reduced from $11,054.69 to $9,682.37, and the plaintiff appearing in open court and consenting to said remittitur.

It is therefore ordered and adjudged that the amount of said judgment be and is hereby reduced to $9,682.37, and that as thus modified the said judgment be and is hereby affirmed, and execution is awarded therefor.

And afterwards, on November 13th, 1902, there was filed herein a certain Remittitur, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

Remittitur.

THOMAS BAILEY, Plaintiff,
vs.
CHARLES W. MOSHER ET AL., Defendants.

The verdict in this cause for the sum of $11054.69 as returned by the jury, being excessive in the sum of $1372.32, and the plaintiff having been ordered and permitted by the court to enter remittitur in that amount.

The plaintiff therefore hereby remits from the verdict as returned by the jury the sum of $1372.32, so that the verdict in his favor may be reduced to the sum of $9682.37, in accordance with the order of the court.

THOMAS BAILEY,
By R. S. NORVAL &
J. J. THOMAS, *His Att'ys.*

THE STATE OF NEBRASKA, *Seward County, ss:*

I, J. M. Calder, Clerk of the District Court in and for Seward County, Nebraska, do hereby certify that the foregoing is a full, true

and complete transcript of the following papers filed in the
132 case of Thomas Bailey Plaintiff, against Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, David E. Thompson, Richard C. Outcalt and Rollo O. Phillips, Defendants, to-wit: Original Summons served on A. P. S. Stuart, in Seward County, and on the other defendants in Lancaster County, with return thereon, Amended Petition filed on March 16, 1899, the Demurrer of all defendants to said Amended Petition, the ruling of the Court on said demurrer; Answer of Administrators of the Estate of Homan J. Walsh, deceased; separate Answer of Charles E. Yates & Ellis P. Hamer; Answer of Charles W. Mosher; Answer of Richard C. Outcalt; Reply to separate Answer of the Administrators of Homan J. Walsh, deceased; Reply to Separate Answer of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher and Richard C. Outcalt; All the Stipulations filed on May 29th, 1902; All Journal entries and orders of Court had of record during said term of Court in said case; The Instructions, and Special Instructions to the Jury; Instruction requested by the defendants and refused by the Court; Motions for New Trial by Richard C. Outcalt, Charles W. Mosher, Administrators of the Walsh Estate; Administratrix of the Ellis P. Hamer, Estate; and Charles E. Yates; Motion for judgment in favor of defendants Walsh, notwithstanding the verdict of the Jury; the motion to correct the amount of judgment found by the jury herein, and the Remittitur filed for such corrections.

I also certify that the bill of exceptions herewith transmitted are the original Bill of Exceptions filed herein, consisting of three volumns, and that I have received the sum of $27.90 from the defendants for this transcript.

In witness whereof I hereunto set my hand and affix the seal of this Court this 15th day of November, 1902.

[SEAL.] J. M. CALDER,
Clerk District Court.

133–134 Endorsed: 13032. Charles E. Yates *et al., vs.* Thomas Bailey. Transcript. Supreme Court of Nebraska. Filed Nov. 28, 1902. Lee Herdman Clerk.

* * * * * * *

135 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Motion in words and figures following, to-wit:

In the Supreme Court, State of Nebraska.

CHARLES E. YATES and LOUISA HAMER, Administratrix, Plaintiffs in Error,

vs.

UTICA BANK and THOMAS BAILEY, Defendants in Error,

and

DAVID E. THOMPSON, Plaintiff in Error,

vs.

BANK OF STAPLEHURST and THE JONES NATIONAL BANK, Defendants in Error.

Now comes the plaintiffs in error in each of the above cases and moves the court to make an order on the Clerk of this court directing said Clerk to file the Bill of Exceptions in said cases consisting of three columns, not only in the above entitled cases but also in the cases as follows:

Charles E. Yates *vs.* Jones National Bank, Charles E. Yates *vs.* The Bank of Staplehurst, Charles E. Yates *vs.* Thomas Bailey, Louisa Hamer, administratrix *vs.* Thomas Bailey, Louisa Hamer, Administratrix *vs.* The Jones National Bank, Louisa Hamer, Administratrix *vs.* Utica Bank, David E. Thompson *vs.* Bank of Staplehurst, David E. Thompson *vs.* Jones National Bank, for the reason that all of said cases were tried at one time, before the same court, and the same jury, on the same evidence as shown in the Bill of Exceptions by direction of the trial court and in accordance with the stipulation of the parties, to said cases, as follows:

In the District Court of Seward County, Nebraska.

THE BANK OF STAPLEHURST, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

THE JONES NATIONAL BANK, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

136 UTICA BANK, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER ET AL., Defendants.

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the District Court of Seward County, Nebraska, hereby stipulate and agree that all

of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable to any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the ruling of the court, shall be offered and produced and the cases respectively disposed of by court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence insofar as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such cases in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts of the *court* may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received and that then the whole evidence as thus introduced shall
137 be properly applied to each respective case and to each respective party thereto under the rulings and directions of the court, subject to the objections of either party.

It is therefore agreed that if either party or any party to any of said causes represented in the stipulation shall desire to prosecute error from the judgment of the District Court in any or all of said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one Bill of Exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases, and that the Bill of Exceptions settled in one case shall be the Bill of Exceptions in each and all of said cases.

In Witness Whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,
J. J. THOMAS,
Attorneys for Plaintiffs.
H. F. ROSE AND
J. W. DEWEESE,
Attorneys for D. E. Thompson.
J. W. DEWEESE,
Att'y for Def'ts Yates, Walsh Estate, & Hamer Estate.
CHAS. O. WHEDON,
Attorney for Chas. W. Mosher and R. C. Outcalt.

H. F. ROSE AND
J. W. DEWEESE,
Att'ys for Pl'ffs in Error.

Endorsed: C. E. Yates Pl'ff in Error *vs.* Utica Bank, *et al.*, 13030 13031–32 and 33. Charles E. Yates, *et al.*, *vs.* Jones Nat. Bank *et al.* Motion *in re* Bill of Exceptions. Supreme Court of Nebraska. Filed Nov. 28 1902. Lee Herdman Clerk.

138 And afterwards, to-wit, on the 2nd day of December, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in the words and figures following, to-wit:

No. 13030.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE JONES NATIONAL BANK, Defendants in Error.

No. 13031.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

UTICA BANK, Defendant in Error.

No. 13032.

CHARLES E. YATES, LOUISA HAMER, Administratrix, ET AL., Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

No. 13033.

CHARLES E. YATES, LOUISA HAMER, Administratrix, and DAVID E. THOMPSON, Plaintiffs in Error,

v.

THE BANK OF STAPLEHURST, Defendant in Error.

Now on this 2nd day of December, 1902, the motion filed by the several plaintiffs in error in each one of the above entitled causes of action, came on for hearing, and on due consideration the Court sustains the said motion in each of the causes.

It is, therefore, ordered and adjudged that the Clerk be ordered and is hereby directed to file the one bill of exceptions
139–196 resulting from the trial of said several causes in each of said several causes to be for the use and benefit of each of the said several plaintiffs in error as the original bill of exceptions in each one of said causes.

It is further ordered that the stipulation made by and between the parties to the said several suits for the trial of said several causes at one time before one jury and for the use of one bill of exceptions if either party desired to have the judgment of the lower court reviewed, shall be and is hereby ordered to be considered as a part of the bill

of exceptions, although it is attached in fact to the Clerk's transcript of the record, in the disposition of the said several causes, shall be used and considered a part of the bill of exceptions.

* * * * * * *

197 And afterwards, to-wit: on the 17th day of November, 1903, the following proceedings were had and done, to-wit:

The following causes were argued and submitted.
No. 13032. Yates *v.* Bailey. Error to Seward County.

And afterwards, to-wit, on the 17th day of March, 1904, there was rendered by said Supreme Court and entered of record upon the Journal thereof a certain Order in words and figures following, to-wit:

No. 13032.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THOMAS BAILEY *et al.*, Defendants in Error.

Error to the District Court, Seward County.

Upon motion of the Court it is ordered that this cause be called for further argument of counsel April 19, A. D. 1904.

And afterwards, to-wit, on the 19th day of April, 1904, the following among other proceedings were —:

The following causes were reargued and submitted to the Court.
No. 13032. Yates *v.* Bailey. Error to Seward County.

And afterwards, to-wit, on the 19th day of October, 1905, there was rendered by said Supreme Court and entered of record upon the journal a certain Judgment in words and figures following, to-wit:

198 No. 13032.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THOMAS BAILEY, Defendants in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon proceedings in error to the district court of Seward County, was argued by counsel and submitted to the court; upon full consideration whereof, the court doth find no error apparent in the record of the proceedings and judgment of said district court, and it is therefore considered, ordered and adjudged that the judgment of said district court be, and the same hereby is affirmed; that defendant in error pay all costs in-

curred herein by him taxed at $—, and have and recover from plaintiffs in error all his costs so expended herein; that plaintiffs in error pay all costs incurred herein by them, taxed at $—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

And on the same day there was filed in the office of the Clerk of the said Supreme Court a certain Opinion, by said Court, pursuant to which the preceding judgment was rendered, which Opinion is in the words and figures following, to wit:

199

No. 13030.

YATES
v.
JONES NATIONAL BANK.

No. 13031.

YATES
v.
THE UTICA BANK.

No. 13032.

YATES
v.
BAILEY.

No. 13033.

YATES
v.
THE BANK OF STAPLEHURST.

Opinion.

Filed October 19, 1905.

Commissioner's Opinion, Department No. 2.

1. Damages resulting to a national bank, from the misfeasance or mismanagement of its officers, are assets of the bank and are recoverable only in an action brought by the bank or for the benefit of all the stockholders and creditors thereof.
2. The officers of a national bank are personally liable for false reports made and published by them, in pursuance of Sec. 5211, Rev. Stat. U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute but the common law.

3. It is no defense to an action of that character that such reports were made and published by the officers without knowledge of their falsity. Following Gerner *v.* Mosher, 58 Nebr., 135.
4. A cause of action, once finally determined between the parties on the merits, can not afterward, so long as such judgment remains in force, be litigated by new proceedings, either before the same or some other tribunal.
5. The foregoing rule applies, not only to judgments which are the result of a trial of issues of fact, but also to judgments on demurrer, where such judgments go to the merits of
200 the case; but a judgment on a demurrer, which is based on a technical defect of pleading, lack of jurisdiction, or the like, does not involve the merits of the controversy, and will not support the plea of *res judicata.*
6. The voluntary dismissal of an action, before final submission, does not operate as an estoppel, and is without prejudice to a future action.
7. Under our practice the common law rule, making the payment of costs in the action dismissed a prerequisite to the prosecution of another, is one which the trial court in the exercise of a sound discretion may or may not apply.
8. Evidence examined, and held sufficient to sustain the findings of the jury.

201 ALBERT, *C.:*

In 1893, the Jones National Bank and the Bank of Staplehurst each brought an action against Charles W. Mosher, Homer E. Walsh, David E. Thompson, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt and Rollo O. Phillips; and Thomas Bailey and the Utica Bank, each brought an action against all of the said defendants except David E. Thompson. The actions were brought in the district court of Lancaster county, and the several petitions so far as the present inquiry is concerned are substantially the same, and the allegations are, in effect, as follows: That from the 9th day of December, 1886, to the 21st day of January, 1893, the Capital National Bank, of Lincoln, was a corporation duly organized, existing under and by virtue of the banking laws of the United States, that the defendants were the directors and officers thereof, and, as such, had exclusive control and management of its affairs. That during the whole of said period the Bank was insolvent, as the defendants well knew, or, by the exercise of due diligence would have known, and, that on or about the 23rd day of January, 1893, it passed into the hands of a receiver, who, at the commencement of the action, was in possession of all of its assets. That from the 9th day of December, 1886, to the date such bank passed into the hands of the receiver, the defendants, in pursuance of the banking laws of the United States and on the demand of the comptroller of the currency, from time to time made statements, and caused and permitted statements to be made, to the comptroller of the currency purporting to show the financial condition of such bank at the time such statements were respectively

made, and caused such statements to be published in certain newspapers of general circulation in this state. That the defend-
202 ants, although chargeable with knowledge of the true condition of said bank, and that it was not in a prosperous condition, but insolvent when such reports were respectively made, for the purpose of deceiving the plaintiff and others and thereby inducing them to deposit their money in said bank, made out and caused said statements to be made in such a way as to show that the bank was in a prosperous condition and that it was safe and solvent. That such statements were brought to the notice of the plaintiff, and, that relying thereon and believing them to be true, the plaintiff, induced thereby, made certain deposits in the said bank before it passed into the hands of the receiver. That if each of the defendants did not have actual knowledge of the false and fraudulent character of such statements, and of the actual condition of the bank when such statements were made, his lack of knowledge was the result of his gross negligence in respect to his duties as an officer of the bank. Then follow allegations to the effect that the defendants, as officers of such bank, had loaned sums of money and had allowed and paid dividends to its stockholders while the bank was insolvent, contrary to and in violation of the banking laws of the United States. The concluding allegations are as follows:

"* * * and by reason of the several violations of the banking law as above set forth by these several defendants they have become and are liable to this plaintiff for the damages he has sustained by reason of their acts in the sum of $11,500, together with interest thereon from the 11th day of October to the 28th day of December, 1892, at the rate of seven per cent per annum."

In each case the defendants demurred on four grounds: (1) Want of jurisdiction of subject matter. (2) Plaintiff's want of legal capacity to sue. (3) Defect of parties plaintiff. (4) Insufficiency of the facts stated to constitute a cause of action.
203 The defendants also filed petitions, asking the removal of the causes to the federal court, for the reason that the actions involved a construction of the National Banking Act. The causes, were removed, and thereupon the plaintiff filed motions in the federal court, asking that the causes be remanded, for the reason that they involved no federal question. The motion was overruled.

In the action brought by the plaintiff Bailey the federal court sustained the demurrer to his petition and dismissed the case. Bailey prosecuted error to the Circuit Court of Appeals, when the rulings of the lower court on the motion to remand and the demurrer to the petition were sustained, and the judgment of dismissal was affirmed (Bailey *v.* Mosher, 63 Fed., 488) whereupon the other plaintiffs dismissed their actions.

Thereafter, the plaintiffs each brought an action against the parties they had respectively made defendants before, in the district court of Seward county. The petitions, in the latter cases, as they stood at the time of the trial, are substantially the same as those in the former, save that it is not alleged in

the latter that the Capital National Bank was organized under the laws of the United States, nor that the statements therein mentioned, purporting to show the financial condition of said bank, was made in pursuance of the banking laws of the United States or on the demand of or to the comptroller of the currency. The concluding of the latter petitions *are* as follows:

"Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged in the sum of Twenty Thousand ($20,000) Dollars."

On the application of the defendants, the case of Bailey *v.* Mosher, *et al.* was removed to the U. S. Circuit Court, on the
204 theory that it was brought under the United States Banking Act for misfeasance or mismanagement of the defendants, as officers of a national bank. On motion of the plaintiff, the Circuit court remanded the cause to the state court, holding that no federal question was involved. Bailey *v.* Mosher, *et al.*, 74 Fed., 15.

When the cause again reached the state court, the several petitions were amended by interlineation, whereby they were brought to their present form. Whereupon on application of the defendants, the cases were removed to the U. S. Circuit Court, on the theory that the amendment had injected a federal question. The Circuit Court overruled a motion to remand, sustained a demurrer to the petition and dismissed the cause. Bailey *v.* Mosher, *et al.*, 95 Fed., 223. On appeal, the question was presented to the Circuit Court of Appeals, the judgment of the Circuit Court was reversed and the causes remanded to the state court, for the reason that they involved no federal question. Jones *v.* Mosher, *et al.*, 107 Fed., 561.

The subsequent pleadings are somewhat voluminous, and it will suffice to say that the questions hereinafter discussed are sufficiently presented. The defendant Stuart made default and judgment was taken against him. The defendants Hamer and Phillips died after the action was commenced; as to the former the action was revived against his estate; as to the latter no proceedings for revivor were had.

The cases were all tried at the same time and submitted on the same evidence. At the close of the evidence the court directed a verdict in each case in favor of the defendant Walsh. As to the other defendants, in the several cases, to which they were respectively parties, the jury found for the plaintiff and judgment was given accordingly, from which the defendants respectively prosecute
205 error to this court. One of the principal contentions of the defendant- reduced to its simplest form, is as follows: (1) Damages resulting to a national bank, from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers, only in an action brought by the bank, or for the benefit of all of the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank, and are recoverable only in an action brought

by the bank, or for the benefit of all the stockholders and creditors.

The major premise is so nearly a self evident proposition that it requires no elaboration. It is recognized in Bailey *v.* Mosher, *supra,* and in the cases there cited. But we are not disposed to accept the minor premise. It is true, the petitions show misfeasance and mismanagement on the part of the defendants, as officers of the bank, and, that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegation may be contained in the petition-, they also contain sufficient to constitute a common law action for deceit. That the party, upon whom the deceit or imposition was practiced by the officers of a national bank, may maintain an action against them in his own name and behalf for damages resulting to him therefrom, and that his right of action does not rest on the federal statutes but the common law, is no longer an open question. Stewart *v.* Bank, 57 Nebr., 576; Gerner *v.* Mosher, 58 Nebr., 135; 61 *id.,* 100; Prescott *v.* Haoghey, 65 Fed., 653; Gerner *v.* Thompson, 74 Fed., 125;
206 King *v.* Pomeroy, 121 Fed., 287; Briggs *v.* Spaulding, 141 U. S. 132.

But, it is contended, that the petitions are substantially the same as that in Bailey *v.* Mosher, *supra,* and that the Circuit Court of Appeals held that such petition committed the plaintiff to the theory that his action was for misfeasance and mismanagement, resulting in damages to the bank, recoverable only in an action by the receiver for the benefit of all the stockholders and creditors. The difference between the petition in that case and those in the cases at bar has already been pointed out, and the importance which the Circuit Court of Appeals attached to some of the allegations of the petition in that case, which are omitted from those now before us, is shown by the following taken from the body of the opinion:

"We feel constrained to hold that, properly construed, the petition contains but one paragraph or count, and states but one cause of action, and that the cause of action stated is one for the misfeasance and mismanagement of the affairs of the bank by the defendants *and* its officers and directors. We can not adopt the view of the plaintiff in error,—that those clauses of the petition which state, or tend to state, a cause of action for deceit at common law, should be segregated from the other clauses of the petition, and held to constitute the statement of the cause of action. The court can not reject the allegations of the petition which do state a cause of action under the banking act, for the purpose of converting mere matter of inducement or surplusage, contained elsewhere in the petition, into a substantive statement of a cause of action different from that which the petition in terms declares to be the foundation of the action. The plaintiff was not bound to state the legal effect of the facts set out in his petition, but, having done so, he can not complain if his adversary and the court accept and act

upon his own theory. Especially is this so when the petition
207 is ambiguous, and will support that theory as well or better than any other.

"In the sense of the word, as used in code pleading, there is but one paragraph in this petition. The term 'paragraph' as used in code pleading, means an entire or integral statement of a cause of action. It is the equivalent of 'count' at common law. It may embrace one sentence or many sentences; but, whether one or many, it constitutes a statement of a single cause of action. It is a requirement of some codes that, if the petition contains 'more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered,' (Code Arkansas, 5027) and all of them require that each cause of action shall be separately stated, and numbered. The Nebraska Code provides that 'where the petition contains more than one cause of action, each shall be separately stated and numbered.' Consol. St. Neb., 1891, 4633 (93). And the Supreme Court of that state, construing this section, have said: 'A plaintiff can not jumble his causes of action together.' Bank *v.* Bollong, 24 Nebr., 821, 40 N. W., 411. If, in drafting the petition, the pleader supposed he was stating more than one cause of action, he would undoubtedly have separately stated and numbered them, as required by the Nebraska Code. No one can point out in this petition where the statement of one cause of action ends and another begins. The plaintiff can not amend or reform his petition in this court. If it were possible to spell out of the averments of this petition, taken separately or together, an action for deceit, the court would be precluded from attaching that meaning to them by the positive statement contained in the petition itself that the action is grounded on the 'violations of the banking law' therein set out. Section 5239 of the Revised Statutes of the United States provided that:

'If the directors of any national banking association shall
208 knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall thereby be forfeited. * * * And in cases of such violation, every director who participated in, or assented to, the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

It is obvious that the plaintiff, in the inception of this case, had in view the enforcement of the defendants' liability under the last clause of this section."

From the foregoing it is clear that the court proceeded upon the ground that the plaintiff, by those allegations of his petition, which are omitted from those in the cases at bar, had committed himself to the theory that his cause of action was one arising under the federal banking law for misfeasance and mismanagement, resulting in damages to the bank. Those very allegations, it held, precluded it from "spelling out" a cause of action for deceit. If those allegations are to be held of so much importance when included in a petition,

it seems to us that their omission, and the studied omission of direct reference to the federal banking law, from the petitions in the cases at bar are equally significant. Besides, it was expressly held, in Jones *v.* Mosher, *et al.*, 107 Fed., 561, that the petition involved no federal question; consequently, it presented no case arising under the federal banking law. It, and the other petitions before us, do state a cause of action for deceit. We know of no rule of pleading that would justify this court in assuming that the plaintiff intended to plead a cause of action which he could not maintain, so long as he has pleaded facts sufficient to constitute one which he
209 could maintain. It may be said in passing that in this state, no such meaning is attached to the term "paragraph," as that given by the Court of Appeals in that case.

It is further insisted, that the judgment rendered in that case supports the plea of *res judicata*, interposed against the plaintiff Bailey in his present action. It is elementary that a cause of action, once finally determined between the parties on the merits, can not afterward, and so long as such judgment remains in force, be litigated by new proceedings, either before the same or any other tribunal. And this rule is not limited to judgments which are the result of a trial of an issue of fact, but applies as well to judgments on demurrer, where such judgments go to the merits of the case. Gould *v.* Evansville, etc. R. Co., 91 U. S., 526; Bissell *v.* Spring Valley Township, 124 U. S., 225; Angles *v.* Mellus, 59 Cal., 444; Gregory *v.* Woodworth, 107 Iowa, 151; Roadman *v.* Michigan Cent. R. Co., 59 Mich., 397. But a judgment on a demurrer which is based on a technical defect of pleading, a lack of jurisdiction, misjoinder of parties, or the like, does not involve the merits of the controversy and is not available as *res judicata*. House *v.* Mullen, 22 Wall., 42; Sivers *v.* Sivers, 97 Cal., 518; Roberts *v.* Hamilton, 56 Iowa, 683. When a plea of *res judicata* is interposed, the controlling question is, whether the judgment offered to support it is based on the merits of the controversy. If it is, it is conclusive and forecloses further investigation. Applying that test to the present case, we do not think the judgment of the court of Appeals, in Bailey *v.* Mosher, *supra*, supports the plea of *res judicata*. It does not dispose of the action for deceit on its merits, but on the technical ground that, by the averment of mere conclusions of law, the plaintiff had committed himself to the theory that the
210 action was of a different character, and precluded an examination of the merits of his action for deceit.

As to the other plaintiffs, it is insisted, that they are concluded by the judgments of dismissal, rendered in the respective cases by the federal court. It will be remembered, that in all of those cases, save that brought by Bailey, the dismissal was on the motion of the plaintiffs, and before the trial of any issue of law or fact. A dismissal, under such circumstances, does not operate as an estoppel, and is no bar to another action. Sec. 430, Code Civil Procedure, seems to embody the prevailing doctrine in regard to a voluntary dismissal, and provides, among other things, that an action may be dismissed by the plaintiff, before a final submission of the cause to

the jury, without prejudice to a future action. See Beals *v.* Western T. U. Co., 53 Nebr., 601; Bank *v.* State, 56 Ld., 188; Harrison *v.* Insurance Co., 80 N. W. (Ia.), 309. That the costs had not been paid in the cases voluntarily dismissed, does not estop the plaintiffs to prosecute these actions. So far as our practice is concerned, the most that can be said of the common law rule, making the payment of the costs in the former action a prerequisite to the prosecution of another, is, that it is one which the trial court, in the exercise of a sound discretion, may or may not apply. U. P. R. R. Co. *v.* Mertes, 35 Nebr., 204. The record shows no abuse of discretion in this instance.

It is next contended by the defendants that these causes were brought and prosecuted on the theory that they were actions for misfeasance and mismanagement. The record does not sustain that contention. It is true there is a large amount of evidence in the record tending to establish misfeasance and mismanagement of the affairs of the bank by the defendants. But this evidence was not introduced for the purpose of proving such facts, but was, in most instances, inseparably connected with evidence tending
211 to establish an action for deceit. That the court tried the cases as actions for deceit, is clearly shown, we think, by an instruction following the statement of the issues, in which the jury were instructed, that the burden of proof was on the plaintiffs to establish the allegations contained in their several petitions closing with these words: "In other words, the burden is upon the plaintiffs severally to show, that the defendants severally published, or caused to be published, or participated in the publication of the statements of the condition of the Capital National Bank * * * that the plaintiffs, each for himself, relied upon the truth of said statements; * * * that such statements were untrue * * *."

It is earnestly contended by the defendants, that the verdicts are not sustained by sufficient evidence. The evidence makes up three large volumes, and it is impossible to discuss it, save in the most general way, without extending this opinion to undue length.

It was incumbent on the plaintiffs to establish by a preponderance of the evidence, (1) That the defendants published the statements purporting to show the financial condition of the Capital National Bank or participated in the publication thereof; (2) That such statements were false; (3) That the plaintiffs severally relied upon such statements and believed them to be true, and were thereby misled to their injury. As to the first proposition, the evidence shows that none of the statements were actually made by all of the defendants, but that each defendant participated in making some of them. It is urged on behalf of the defendant Thompson that he participated *on* making but one of them. That is a mistake; the evidence is conclusive that he signed and participated in making at least four of them, the first being that made and published December 28, 1886, the last that made and published July 9,
212 1891. The mistake arises, perhaps, from the construction which the defendants seem to place on the petitions. The petitions set out two of the statements at length, but it is also alleged

that at divers other times and dates, between the 28th day of December, 1886, and the 21st day of January, 1893, the defendants made and published other false and misleading reports purporting to show the condition of the bank which were relied upon by the plaintiff. The defendants appear to take the position, that the plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion.

As to the proposition that the statements were false, the evidence involves a maze of figures and computations covering a large portion of the bill of exceptions. The defendants contend, among other things, that the only discrepancies shown by the evidence are discrepancies between the balance book of the bank and the statements, and that such discrepancies are due to the fact that the comptroller of the currency, in pursuance of his authority under the federal banking law, required a different classification of the items in such statements, than that under which they were classified on the books of the bank; that the relation between the totals was not thereby disturbed, consequently, such discrepancies are immaterial. The contention is not borne out by the record. The evidence not only tends to show discrepancies between the statements and the books of the bank, but also between such statements and the actual condition of the bank when the statements were respectively made, and that such discrepancies materially disturbed the relation be-
213 tween the totals of the assets and liabilities of the bank, and made its condition appear better than what it actually was. In short, there is ample evidence to sustain a finding that the bank was insolvent before and during the period covered by the transactions of the plaintiffs with it; that had the statements been made in accordance with the facts they would have shown, notwithstanding the classification required by the comptroller of the currency the true condition of the bank, or at least sufficient to put prospective customers upon inquiry; but instead, they exaggerated the assets, depreciated the liabilities, and were so framed as to conceal the actual condition of the bank and convey the impression that it was not only solvent but prosperous. In the face of these facts, no manipulation of figures or refinement of argument can make it appear that the discrepancies are immaterial, or, that there is a lack of proof that the statements were false. We do not wish to be understood to say that all of the defendants knew that such statements were false; we are satisfied that such is not the case. But, as was said in Gerner *v.* Mosher, 58 Nebr., 135, it was their duty to know whether the statements made by them were true, and the fact that they made and published them without knowledge of their falsity is no defense.

As to the proposition that the plaintiffs relied upon such statements and believed them to be true, and were thereby misled to their injury, we consider it sufficiently established by the

evidence. The plaintiff Bailey testified, that he had had some money to invest and read the published statements of the different banks, including those of the Capital National, in order to keep himself informed of their condition. The following is a portion of his testimony on this point:

Q. How did you come to go to the Capital National Bank?

A. I went on purpose to see what they would pay on the
214 money. And I thought it was just as good as the First National.

Q. What information did you have as to the condition of the Capital National Bank?

A. As soon as I went in they handed me a card and the Directors and stockholders of the Bank were on that card. And I took the papers several years previous.

Q. What papers?

A. The Semi-Weekly Journal I believe and the Call.

Q. What did you see?

A. I saw the bank was in good circumstances, as I supposed, the way the amount of assets read in the published statements.

Q. Well, what did you read in those papers—published statements?

A. Yes—in the published statements in the paper.

Q. Of what bank?

A. The Capital National Bank of Lincoln, Nebr.

Q. State when it was, with reference to time——

A. I suppose ever since the bank started, for I read the papers every day and took particular notice. I had some money to loan out and I took a little notice where I thought was the best place to put it.

Q. And what reliance did you make, if any, upon these statements?

A. Well, that was all the reliance I had was what I could get information in the papers in regard to the standing of the bank.

Q. State what information, if any, you had other than what was disclosed in the statements that were published.

A. That was all the information I had.

Q. You may state where you got your information as to the condition of this bank.

A. I got it from the published statements.

Q. And from any other source?

215 A. No sir, I had no other source to get it from.

Q. State what effect those published statements had upon your transacting business at the Capital National Bank, if any?

A. Why that is all the effect I had to go by was the published statement, supposing it was to be true and correct.

Q. Did you believe it to be true?

A. I believed it to be true or I wouldn't have put my money there, I would have kept it where it was.

Q. Now you may state if you knew at any time, or had any means of knowing that the Capital National Bank * * * was not financially in the condition as represented by its statements.

A. I had no means of knowing.
Q. Well, did you have any knowledge?
A. I had no knowledge.
Q. State what belief, if any, you put in those statements prior to the time you deposited your money in the bank.
A. I believed the statements to be true, or I never would have put my money in the bank, that is sure.

Cross-examination:

Q. And there was no bank in Lincoln, or in the state that you knew of, that stood higher in the general estimation than it?
A. Not in my own mind according to their statement. I don't think there was any in Lincoln any way.

His evidence, fairly construed, sufficiently shows that he relied upon the false statements, believed them to be true, and, consequently, that the bank was safe; that acting in that belief, and influenced by it, he transferred his business to such bank. It is true, his evidence shows that he was influenced somewhat by the higher rate of interest this bank was paying. But it is well settled, that where false statement is relied upon, and is a material inducement,
it is immaterial what other causes contributed to influence the
216 conduct of the injured party. Runge *v.* Brown, 23 Nebr.,
817; Foley *v.* Holtry, 43 *Id.*, 133; Alcott *v.* Bolton, 50 *Id.*, 179; Sioux City National Bank *v.* Norfolk State Bank, 56 Fed., 139. The evidence adduced on behalf of the other plaintiffs on this point is stronger than that adduced by Bailey, and is sufficient, we think, in each case to sustain a finding that the plaintiffs relied upon the statements, believed them to be true and were misled thereby to their injury.

We have gone over the evidence in this case with some care, fully alive to the liability of the jurors to draw wrong inferences, in cases of this character, owing to the lack of time and facilities to consider and weigh the mass of evidence introduced, and are thoroughly satisfied that every fact, essential to a recovery in these cases, is sufficiently sustained by the evidence. We have also gone over the several errors assigned, and have examined them in the light of exhaustive briefs and luminous oral arguments of the learned gentlemen representing the respective parties, but have found no reversible error.

It is therefore recommended that the several judgments be affirmed.

By the COURT: For the reasons stated in the foregoing opinion, the said judgments and each of them are affirmed.

217 And afterward, to-wit, on the 24th day of November, 1905, there was filed in the office of the Clerk of said Supreme Court a certain Motion for Rehearing in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

No. 13032.

CHARLES E. YATES and LOUISA HAMER, Administratrix of the Estate of E. P. Hamer, Deceased, Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

Motion for Rehearing.

Now come the plaintiffs in error and each for himself moves the Court to grant a re-hearing in the above entitled cause for the following reasons:

1. The Court has erred in holding that the petitions on which the cases were tried in the District Court of Seward county stated a cause of action for deceit and fraud only, and not for the enforcement of any duties or liabilities of the directors, as officers of a national bank under the National Banking Act, and in construing said petitions as stating a different cause of action from that of the petitions filed in Lancaster county against the same defendants for the same cause of action, which are conceded and decided to be for the enforcement of duties and liabilities of the defendants under the National Banking Act.

2. The Court has erred in holding that it is bound by the construction placed upon the petitions by counsel for the plain-
218 tiff in the actions commenced in Lancaster county, in pleading the legal conclusion that these actions were for the enforcement of liability for violations of the duties and obligations of the Federal Banking Act, and that the omission of these legal conclusions in the petitions filed in Seward county upon the same causes of action justified the Court in holding that the rights, obligations and liabilities in the cases at bar are not determined by the Federal Banking Act, because the Court should have exercised its independent judgment in construing the petitions without regard to the construction of the pleader.

3. The Court has erred in holding that the petitions filed in the Seward County Actions stated a cause of action for fraud and deceit and different from those filed for the same cause of action in Lancaster County, because of the allegations of legal conclusions that the former were actions to enforce liability for violations of the Federal Banking Act which were omitted from the latter.

4. The Court erred in determining the character of liability in these cases by looking to the petitions alone when the acts complained of and the character of liability should be determined by the issues joined between the parties and the evidence adduced pertaining to the law by which and under which the acts and things complained of were done.

5. The Court erred in holding that the plaintiff could maintain his cause of action and recover damages in his own name as an individual depositor in the Capital National Bank.

6. The Court has erred in holding that the judgment
219 rendered on the merits in favor of the defendants in the case decided in the Federal Court, which was removed from Lancaster County is not an adjudication between the same parties which amounts to a bar to the prosecution of this action.

7. The Court has erred in refusing to give full faith, credit and effect to the judgment of the Federal Court in favor of the defendants in the action removed from Lancaster County which was between the same parties and for the same cause of action, in violation of the provisions of the constitution and laws af the United States. Revised Statutes, U. S., Sec. 905. Constitution of the United States, Sec. 1, Article 4.

9. The Court has erred in holding that a common law action of deceit could be maintained against the officers and directors of the Capital National Bank on account of the manner in which they managed and conducted the business of said bank, and in making and publishing reports to the Comptroller concerning the condition of said bank, in performance of their duties under the National Banking Act which determined and provided the duties a-d liabilities of the defendants in their actions thereunder.

9. The Court has erred in holding that it was not necessary in establishing liability against the directors to show that the directors knew the falsity of reports to the Comptroller of the Currency, which they attested as required by the National Banking Act, because that Act provides for liability only in cases where they knowingly violate or knowingly permit the violation of the provisions of that Act.

10. The Court has erred in holding that the United States Court of Appeals in the case of Jones *v.* Mosher, 107 Fed. Rep., 561, decided that the plaintiff's petition did not involve any Federal
220–225 question, and that the petitions did state a cause of action when that Court did not decide the character of the case made by the petitions but only that it had no jurisdiction because the removal was made too late.

11. The Court has erred in holding and deciding that the defense reduced to its simplest form is that damages which result to a national bank from misfeasance and mismanagement of its officers are an asset of the bank recoverable from such officers only in an action by the bank for the benefit of all the stockholders, whereas, the defense actually made is that the only liability of the officers for acts done in the conduct of the business of the bank under the National Banking Act is that provided by the Banking Act and must be enforced against such officers for the benefit of all the creditors and stockholders for ratable distribution under that act.

12. The Court has erred in holding that the plaintiff is entitled to recover under the petitions filed for the reason that they state no sufficient cause of action for fraud, misrepresentation and deceit.

FRANK E. BISHOP,
J. W. DEWEESE,
Att'ys for Pl'ffs in Error.

Endorsed: 13032. Yates *v.* Bailey. Motion for rehearing. Supreme Court of Nebraska Filed Nov 24 1905 H. C. Lindsay, Clerk. Oct. 19/05 Opinion by Albert, C. Overruled 2-20-06.

* * * * * * *

226 And afterward, to-wit, on the 22nd day of February, 1906, there was rendered by said Supreme Court and entered of
227 record upon the Journal thereof a certain Judgment in the words and figures following, to-wit:

No. 13032.

CHARLES E. YATES ET AL., Plaintiffs in Error,
v.
THOMAS BAILEY, Defendant in Error.

Error to the District Court of Seward County.

This cause coming on to be heard upon the motion of Defendant in Error for a rehearing on the motion to quash Bill of Exceptions, was submitted to the Court; upon full consideration whereof, it is by the Court ordered that said motion be, and the same hereby is overruled.

This cause further coming on to be heard upon the motion of Plaintiffs in Error for a rehearing herein, was submitted to the Court; upon full consideration whereof, the court doth find no error apparent in the judgment theretofore entered herein by this Court; and it is therefore considered, ordered, and adjudged that said motion be, and the same hereby is overruled and a rehearing herein refused and denied.

Upon request of Plaintiffs in Error, it is by the Court ordered that mandate in the above entitled cause be, and the same hereby is withheld until the further order of the Court.

228 And on the 22nd day of February there was filed in the office of the Clerk of said Supreme Court a certain Petition for Writ of Error, which said original Petition for Writ of Error is hereto attached, and is in the words and figures following, to-wit:

229 In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Ellis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

To the Honorable Chief Justice of the Supreme Court of the State of Nebraska:

The above named plaintiffs in error each complain that in the judgment, decision, record and proceedings in a certain cause pend-

ing in the Supreme Court of the State of Nebraska in which the above named plaintiffs in error were the plaintiffs in error and Thomas Bailey was defendant in error which cause was decided and determined by the Supreme Court of the State of Nebraska and judgment of affirmance rendered therein on October 19, 1905, and in which a motion for a re-hearing in said court was overruled on February 21st, 1906, at which time the judgment of said court became final, which Supreme Court of the State of Nebraska was the highest court in which decision or judgment could be had in said action, in which action and the judgment and the decision thereon there was necessarily involved and decided by said court that the provisions of the National Banking Act of the United States did not control, limit and determine the obligations and liability of the plaintiffs in error as officers and directors of the Capital National Bank of Lincoln Nebraska upon their conduct of the business of said bank, and the performance of their duties under said National Banking Act and upon the reports made by the officers and attested by the directors of said bank to the Comptroller of the Currency,
230 and that said officers and directors of said bank were liable for an action of deceit on said reports notwithstanding the provisions of the National Banking Act, and, by said judgment and decision, refused to give full faith and credit to the judgment of the United States Circuit Court for the District of Nebraska, all in violation of the provisions of the National Banking Act and of Section 1, Article 4 of the Constitution of the United States, and of revised statutes of the United States Section 905, manifest error hath happened as appears from said judgment, decision and record and in the assignment of error herewith presented, to the great damage of the plaintiffs in error.

Wherefore, The said plaintiffs in error pray the allowance of a writ of error to the Supreme Court of the State of Nebraska for the removal of said record, judgment and proceedings in said action into the Supreme Court of the United States for its revision and correction thereof and for citation and supersedeas thereon, and your petitioners will ever pray.

CHARLES E, YATES,
LOUISA *P.* HAMER, *Adm'x,*
By J. W. DEWEESE &
FRANK E. BISHOP,
Their Attorneys.
RICHARD C. OUTCALT AND
CHARLES W. MOSHER,
By CHAS. O. WHEDON,
Their Attorney.

Writ of error allowed and ordered to issue.
February 21 1906.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 13032. Yates *v.* Bailey. Petition for writ of Error. Supreme Court of Nebraska. Filed Feb. 22, 1906. H. C. Lindsay, Clerk.

231 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Brief of Assignment of Errors, in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES, LOUISA HAMER, Administratrix of the Estate of Elis P. Hamer, Deceased; CHARLES W. MOSHER and RICHARD C. OUTCALT, Plaintiffs in Error,

v.

THOMAS BAILEY, Defendant in Error.

Now come the said several plaintiffs in error, Charles E. Yates, Charles W. Mosher and Richard C. Outcalt and Louisa Hamer, administratrix of the estate of Elis P. Hamer, deceased, and each separately and severally respectfully submit that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of Nebraska, in the above entitled cause there is manifest error, in this, to-wit:

Assignments of Error.

1. The Supreme Court of the State of Nebraska has erred in affirming the judgment against the several plaintiffs in error as rendered in the District Court within and for Seward county, Nebraska, in favor of the defendant in error.

2. The Court has erred in deciding that the petition on which said cause was tried and decided states facts sufficient to constitute a cause of action in favor of the defendant in error and against the several plaintiffs in error, or either of them.

232 3. The Court has erred in deciding that the petition filed by the defendant in error as its cause of action sets forth a common law action for deceit and fraud based upon the reports made and attested by the plaintiffs in error to the Comptroller of the Currency as required by the National Banking Act.

4. The Court has erred in holding and deciding that the cause of action alleged by defendant in error, and on which judgment was rendered, is not governed and limited by the liability imposed upon the plaintiffs in error by the National Banking Act. (Title 62 U. S. Rev. Sts. of U. S.)

5. The Court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and Cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act under which they were acting in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The Court has erred in deciding that Section 5239 of the Revised Statutes of the United States, being a part of the National

Banking Act, does not control, nor limit, or determine the liability of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency, showing the condition of the bank.

7. The Court has erred in deciding that the fact that those plaintiffs in error who were directors were without knowledge of any falsity of the reports attested by them or some of them, mentioned in the petition, was immaterial, and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports; the said decision is in violation of the provisions of Section 5239 of the Revised Statutes of
233 the United States which makes liability of the directors dependent upon the fact that they knowingly violated or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The Court has erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank can be maintained against such directors, without knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action as required by Section 5239 of the Revised Statutes of the United States.

9. The Court has erred in deciding that, "The officers of a National Bank are personally liable for false reports made and published by them, in pursuance of Section 5211, Rev. St., U. S., to the party injured thereby and the right of the injured party to maintain the action does not rest on the federal statute, but the common law."

10. The Court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself, or its receiver or representative, such recovery to be for the benefit of all the creditors and to be ratably distributed among them as required by Sections 5234 and 5236 of the National Banking Act.

234 11. The Court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of Section 709 of the Revised Statutes of the United States.

12. The Court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster county, by pleading the legal conclusion that the action was for the enforcement of

liability for violation of the duties and obligations imposed by the National Banking Act, and that the omission of such legal conclusion in the petition filed in this case, upon the same cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the Court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The Court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition, and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors, by the National Banking Act.

235 14. The Court has erred in affirming the judgment, thereby approving instruction number 9th, given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue. Said instruction 9th, being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representation of the condition of the Bank contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The Court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

16. The Court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for the District of Nebraska, on February 9, 1894, in an action then and there pending in which the defendant in error herein was plaintiff,

236 and the plaintiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing

to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in violation of the provision of the constitution of the United States, Article 4, Section 1.

Wherefore, said plaintiffs in error each severally pray that the judgment of the said Supreme Court of said State of Nebraska be reversed, and judgment be rendered herein in favor of said plaintiffs, and for costs.

J. W. DEWEESE,
FRANK E. BISHOP,
For Defendants Yates and Hamer.
CHAS. O. WHEDON,
Attorney for Richard C. Outcalt and Charles W. Mosher.

Endorsed: 13032. Yates *v.* Bailey. Assignments of Error. Supreme Court of Nebraska. Filed Feb. 22 1906 H. C. Lindsay, Clerk.

And on the following day, to-wit, the 23rd day of February, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Writ of Error and Allowance thereof, which said original Writ of Error and Allowance is hereto attached, and is in the words and figures following, to-wit:

237 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of Nebraska, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nebraska before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said action between Charles E. Yates, Louisa Hamer, Administrator of Elis P. Hamer deceased, Charles W. Mosher and Richard C. Outcalt, plaintiffs in error and Thomas Bailey, defendant in error wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity; or wherein was drawn in question the validity of the statute of or an authority exercised under said statute of Nebraska on the ground of their being repugnant to the Constitution, statutes or laws of the United States and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under the United States, and the decision was against the right, title privilege or exemption specially set up or claimed under such clause of the said Constitution treaty or statute or commission, *and* manifest error hath happened to the great damage of the above named plaintiffs in error as by their complaint appears. We being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein

given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ so that you have the same in said Supreme Court at
238 Washington, within thirty days from the date hereof, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller Chief Justice of the United States this 23rd day of February in the year of our Lord One Thousand Nine Hundred and six.

[Seal United States Circuit Court, District of Nebraska.]

GEO. H. THUMMEL,
Clerk Circuit Court of the United States
for the District of Nebraska,
By JOHN NICHOLSON, *Deputy.*

Allowed by
SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

[Endorsed:] 13032. Yates *v.* Bailey. Writ of Error. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

239 And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

CHARLES E. YATES ET AL.
vs.
THOMAS BAILEY.

Cost Bond on Writ of Error.

Know all men by these presents, that we Charles E. Yates as principal and W. S. Yates, as surety, are held and firmly bound unto Thomas Bailey in the sum of Five Hundred ($500.00) Dollars to be paid to Thomas Bailey defendant in error, his successors, representatives and assigns to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21st day of February, 1906.

Whereas, The above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment lately rendered in the Supreme Court of the State of Nebraska in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said Charles E. Yates shall prosecute his writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHARLES E. YATES,
By W. S. YATES, *Att'y in Fact.*
W. S. YATES, *Surety.*

240 Sealed and delivered in the presence of

H. C. LINDSAY,
As Witness.

Approved as a cost bond by

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court of the State of Nebraska.

Endorsed: 13032. Yates *v.* Bailey. Bond. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the Clerk of said Supreme Court a certain Bond in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

LOUISA HAMER, Administratrix of Elis P. Hamer, Deceased, ET AL.
vs
THOMAS BAILEY.

Cost Bond on Writ of Error.

Know all men by these presents, that we Louisa Hamer, administratrix of Elis P. Hamer, deceased, as principal, and A. G. Hamer, as surety, are held and firmly bound unto Thomas Bailey in the sum of Five Hundred ($500) Dollars to be paid to Thomas Bailey, defendant in error, his successors, representatives and assigns, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 23 day of February, 1906.

Whereas, the above named plaintiff in error has prosecuted a writ of error in the Supreme Court of the United States to reverse a judgment lately rendered in the Supreme Court of the State
241 of Nebraska, in the above entitled action,

Now, Therefore, the condition of this obligation is such that if said Louisa Hamer, administratrix of Elis P. Hamer, deceased, shall prosecute her writ of error to effect, and answer all costs if she

fail to make her plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

LOUISA HAMER,
Administratrix.
A. G. HAMER,
As Surety.

Sealed and delivered in presence of
H. C. LINDSAY,
As Witness.

Approved as a cost bond by
SAMUEL H. SEDGWICK,
Chief Justice of Supreme Court
of the State of Nebraska.

Endorsed: 13032. Yates *v.* Bailey. Bond. Supreme Court of Nebraska. Filed Feb. 23, 1906. H. C. Lindsay, Clerk.

And afterward, to-wit, on the 8th day of March, 1906, there was filed in the office of the Clerk of said Supreme Court a certain Citation, which original Citation is hereto attached, and is in the words and figures following, to-wit:

242 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to Thomas Bailey, defendant in error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Nebraska, Wherein Charles E. Yates, Louisa Hamer Admrx., Charles W. Mosher and Richard C. Outcalt, are plaintiff- in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Samuel H. Sedgwick Chief Justice of the Supreme Court of the State of Nebraska, this 23 day of February in the year of our Lord One Thousand Nine Hundred and Six.

SAMUEL H. SEDGWICK,
Chief Justice of the Supreme Court
of the State of Nebraska.

Due and proper service of the within citation and the receipt of a copy thereof are hereby accepted, admitted and acknowledged this 8th day of March 1906.

THOMAS BAILEY,
Defendant in Error,
By LIONEL C. BURR,
JOHN J. THOMAS,
RICHARD S. NORVAL,
His Attorneys.

Supreme Court of Nebraska Filed Mar. 8 1906.
H. C. LINDSAY, *Clerk.*

[Endorsed:] 13032. Chas. E. Yates, *et al. v.* Thos. Bailey. Citation. Supreme Court of Nebraska. Mar. 8, 1906. H. C. Lindsay, Clerk.

243 STATE OF NEBRASKA, *ss:*

I, H. C. Lindsay, Clerk of the Supreme Court of the State of Nebraska, do hereby certify that the foregoing is a true and correct transcript of the record, opinion of the court, and final judgment in a cause in said Court, wherein Charles E. Yates, Louisa Hamer, Administratrix of the Estate of Ellis P. Hamer, deceased, David E. Thompson, Richard C. Outcalt and Charles W. Mosher were plaintiffs in error, and Thomas Bailey was defendant in error, as fully as the same is of record and on file in my office.

I further certify that the Bill of Exceptions, a part of the record in said case, herewith transmitted, consists of three volumes designated respectively Volume I, which consists of pages 1 to 612, inclusive; Volume II, which consists of pages 613 to 1320, inclusive; and Volume III, which consists of pages 1321 to 1761 inclusive.

I further certify that the annexed petition for a writ of error, writ of error, and citation are the originals which were lodged in my office, and the whole is now returned in obedience to said writ of error.

I further certify that I have duly retained in my office true and correct copies of said petition for a writ of error, writ of error and citation, with the indorsements thereon.

In testimony whereof, I have hereunto set my hand and the Seal of said Court at Lincoln, this 9th day of March, A. D. 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

244 UNITED STATES OF AMERICA, *Supreme Court of Nebraska, ss:*

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my hand and affix the seal of said Supreme Court, in the City of Lincoln, this 9th day of March, A. D., 1906.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk of the Supreme Court of Nebraska.

MARCH 15, 1906.

Received of plaintiffs in error Seventy-three dollars & ninety-five cents (-73.95) in full payment for within transcript.

H. C. LINDSAY,
Clerk Supreme Court.

245 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Notice.

Notice is hereby given to the above named defendant in error and his attorneys of record, that the assignments of error on which the plaintiffs in error will rely for a reversal of the judgment in said case are attached hereto, and in order to present said errors, the plaintiffs in error designate the certain portions of the transcript of the record in said case, and of the bill of exceptions of the evidence as applicable to the errors relied upon, and said designated portions to be printed in order to present the errors complained of as shown in the schedules attached hereto.

J. W. DEWEESE AND
FRANK E. BISHOP,
Attorneys for Plaintiffs in Error.

Received copy of this notice with copy of assignments of error and designated portions of the record to be printed this 27 day of April, 1906.

L. C. BURR,
R. S. NORVAL, AND
J. J. THOMAS,
Attorneys for Defendant in Error.

246 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Assignments of Error Relied Upon for Reversal and as Basis for Printing Record.

5. The court has erred in deciding that the common law action for deceit can be enforced against the plaintiffs in error based wholly upon the reports made by the President and cashier of the Capital National Bank and attested by the directors of the said bank independent and exclusive of the liability imposed by the provisions of the National Banking Act, under which they were acting, in making, attesting and publishing such reports to the Comptroller of the Currency.

6. The court has erred in deciding that section 5239 of the Revised Statutes of the United States, being a part of the National Banking Act, does not control nor limit or determine the liability

of the plaintiffs in error in making, attesting and publishing the reports to the Comptroller of the Currency showing the condition of the bank.

7. The court has erred in deciding that the fact that those plaintiffs in error who were directors, were without knowledge of any falsity to the reports attested by them, or some of them, mentioned in the petition, was immaterial and that such directors or any of them were liable under the proofs showing they were without knowledge of the falsity of such reports. The said decision is in violation of the provisions of Section 5239 of the Revised Statutes of the United States which makes liability of the directors dependent upon the fact that they knowingly violated, or knowingly permitted the violation of the provisions of the National Banking Act, and participated in or assented to such violation.

8. The court erred in deciding that a common law action of deceit based upon reports of the Capital National Bank made to the Comptroller of the Currency and attested by the directors of such bank, can be maintained against such directors without
247 knowledge of any false statements in such reports, and without any participation in or assent to any violation of the National Banking Act as essential elements of the cause of action, as required by section 5239 of the Revised Statutes of the United States.

9. The court has erred in deciding that, "the officers of a National Bank are personally liable for false reports made and published by them, in pursuance of section 5211, Revised Statutes of the United States, to the party injured thereby and the right of the injured party to maintain the action does not rest on the Federal Statutes, but the common law."

10. The court has erred in deciding that the defendant in error could maintain his cause of action and recover damages against each of the plaintiffs in error in his own name and right as an individual depositor in the Capital National Bank, whereas the only recovery that could be had for false reports or violation of the National Banking Act could be by the bank itself or its Receiver or representative, such recovery to be for the benefit of all of the creditors and to be ratably distributed among them as required by section- 5234 and 5236 of the Nationa- Banking Act.

11. The court has erred in deciding the character of liability of the plaintiffs in error by looking to the petition alone, when the acts complained of, and the character of liability, should be determined by the issues joined between the parties, and the rights set up and claimed by the plaintiffs in error in their answers, and the evidence adduced pertaining to the National Banking law by which and under which the acts and things complained of were done, in violation of section 709 of the Revised Statutes of the United States.

12. The court has erred in deciding that it is bound by the construction placed upon the petition by counsel for the plaintiff in the same cause of action commenced in Lancaster County, by pleading the legal conclusion that the action was for the enforcement of liability for violation of the duties and obligations imposed by the

National Banking Act, and that the omission of such legal conclusions in the petition filed in these cases, upon the same
248 cause of action, justified the Court in deciding that the rights, obligations and liabilities in the case at bar are not determined by the National Banking Act, for the reason that the court should have construed the petition without regard to the construction of the pleader, or his legal conclusions.

13. The court has erred in deciding that the cause of action alleged by the defendant in error constituted a common law action for deceit, whereas the ground of complaint as shown in the petition and the recovery and judgment, are based upon the official misfeasance of the directors of the Capital National Bank, and their mismanagement of the same, in violation of their duties imposed upon them as officers and directors by the National Banking Act.

14. The court has erred in affirming the judgment, thereby approving instruction number 9th given to the jury, which permitted the plaintiff to recover on a report of the condition of the bank, attested by the directors, even though such directors did not know that the report was in fact false or untrue.

Said instruction 9th being as follows:

"9th. Bank officers and directors who make or participate in a published report of the financial condition of the banks of which they are such officers and directors, may become liable for damages sustained by one depositing money in such bank in reliance upon the false representations of the condition of the bank, contained in the report, even though such director or officer did not know that his report so published was in fact false or untrue."

15. The court has erred in approving the refusal of the District Court of Seward County, Nebraska, to give instruction number 6 requested by plaintiffs in error. Which instruction is as follows:

"6th. The jury are instructed that if you find from the evidence introduced in reference to any one of the directors named in any one of the said cases, that such director did not knowingly violate any of the requirements of the National Banking Act, under which he was acting as such director, but acted in good faith, trusting and confiding in the officers, agents of the bank, having no reason to suspect the integrity and honesty of any one of such officers and agents, then you are instructed that your verdict should be in favor of such defendant."

16. The court has erred in deciding that the judgment of dismissal entered by the Circuit Court of the United States for
249 the District of Nebraska on February 9th, 1894, in an action then and there pending in which the defendant in error herein was plaintiff, and the plaintiffs in error herein were defendants, which judgment was affirmed by the Circuit Court of Appeals, reported in 65 Federal Reporter 488, which judgment was entered upon the same cause of action and for the same right to recover as is asserted in this case, is not a bar to this action, and an adjudication of the rights between the parties to the judgment herein; and in refusing to give full faith and credit to said judgment of the Circuit Court of the United States for the District of Nebraska, in

violation of the provisions of the Constitution of the United States, Article 4, Section 1.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

250 In the Supreme Court of the United States.

CHARLES E. YATES, LOUISA HAMER, Administratrix; C. W. MOSHER, and R. C. OUTCALT, Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendants in Error.

Designation for Printing from the Transcript of the Record in the Above Entitled Case.

The plaintiffs in error in the above entitled case, request the Clerk of the Supreme Court of the United States to print the following designated portions of the transcript of the record applicable to the errors alleged in the above entitled case, number 639, to-wit:

1. Title, venue and petitions in error of Charles E. Yates and Louisa Hamer, administratrix, of the transcript, pages 1 to the words "Be it remembered," in the last paragraph on page 11.

2. Transcript page 15, amended petition, beginning with the words, "And afterwards on the 16th, day of March, 1899," to the end of the demurrer including the signature of attorneys on page 28.

(The answer and all pleadings of Walsh, and the Walsh estate should be omitted, as no judgment was rendered against them.)

3. Transcript page 35, Answer of Charles E. Yates and Louisa Hamer, beginning with the words "And afterwards on the 15th day of July, 1901," to and including the oath on answer of Charles E. Yates page 41.

4. Transcript page 53, reply, beginning with the words, "And afterwards on the 23rd day of August, 1901," to oath of Bailey to reply on page 54.

251 5. Transcript page 58, stipulation, beginning with the words, "And afterwards on the 28th, day of May, 1902," to and including the signatures of attorneys thereto page 60.

6. Transcript page 69, instructions given and refused, beginning with the words, "And afterwards on the 19th, day of June, 1902," to the last signature of the Judge on page 97.

7. Transcript page 116, motion for new trial, beginning with the words, "And afterwards on the 21st day of June, 1902," to the signature of the attorneys near the top of page 125.

8. Transcript page 126, order on motion and judgment, to and including the record of the filing at the top of page 133.

9. Transcript page 135, motions order and stipulation on bill of exceptions, to the end of the order of the Supreme Court at the middle of page 139.

10. Transcript page 197, proceedings, judgment, opinion and motion on re-hearing, to the end of page 220, except the last two lines.

11. Transcript page 226, order on re-hearing and proceedings on writ of error, beginning with the words, "And afterwards, to-wit on the 22nd day of February, 1906," to and including page 244.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

252 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Designating for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Case.

The plaintiffs in error in the above entitled case request the Clerk of the Supreme Court of the United States to print the designated portions of the bill of exceptions as follows, (The numbers refer to red figures at lower right hand corner of pages), to-wit:

There being no assignments of any errors on account of the offer and rejection of testimony, all objections and exceptions to testimony in the bill of exceptions of the evidence are to be omitted from the printed record.

1. Title, pages 1 and 2.
2. Testimony of A. D. Lynch, pages 8 to 13 inclusive.
3. Correspondence and oaths, page 14 to near the middle of page 21, (Similar oaths were taken by the directors from the beginning of the bank to the time of its failure in 1893).
4. Report of December 9th, 1892 and certificate of publication on reverse side, pages 39 and 40, front and reverse side, omitting objections.
5. Bank Charter, pages 52 and 53, omitting objections.
6. Letters to and from Comptroller, pages 56 except the first line, to 64 inclusive, omitting objections.
7. Publication of reports, page 68 commencing with the words "Notice of publication in the State Journal," to page 69 inclusive, omitting objections.
8. Publication of reports, commencing near the middle of page 76 with the words, "Mr. Norval, I now offer in evidence exhibit No. 980," and page 77 inclusive, omitting objections.
9. Testimony of H. J. Whitmore, page 340.
10. Cross-examination of H. J. Whitmore, page 708 *including* objection.

253 11. Cross-examination of H. Whitmore, page 709 commencing with the last question on said page with these words: "I will ask you to state whether these reports that you have referred to," to the end of the answer to that question on page 710, inclusive.

12. Testimony of E. Jacobs, page 864 to page 896 inclusive, omitting objections.

13. Testimony of E. Jacobs, page 901, beginning with the first question thereon, to page 903, ending with the answer: "I had no other source," omitting objections.

14. Testimony of E. Jacobs page 911 beginning with the question, to the words, "Witness excused" on page 916, omitting objections.

15. Testimony of Thomas Bailey, page 916 to the words "Witness excused," on page 934, omitting objections.

16. Testimony of Fritz Beckard, page 934, beginning with the words, "Mr. Fritz Beckard called as witness," to the words, "Witness excused" on page 949, omitting objections.

17. Testimony of H. T. Jones, page 974, to the words "Yes, sir," near the middle of page 975, omitting objections.

18. Testimony of H. T. Jones, page 977 to the last question on page 981, omitting objections.

19. Testimony of H. T. Jones, page 983 beginning with the first question thereon, to page 984, inclusive.

20. Testimony of C. E. Yates page 1111, commencing with the words "Mr. C. E. Yates called as a witness," to page 1121, ending with the words, "Witness excused," omitting objections.

21. Testimony of D. E. Thompson, page 1132 to the words "Witness excused," page 1188, omitting objections.

22. Former adjudication in the Bailey case, pages 1242 to 1274, inclusive, omitting objections.

254 23. Bank reports, pages 1297, commencing with words: "Mr. Thomas, the plaintiffs offer in evidence exhibit No. 1074," and exhibit number 1074 (7 sheets) attached, omitting objections.

24. Bank reports, pages 1304 and exhibit number 1075 (7 sheets) attached, omitting objections.

J. W. DEWEESE,
F. E. BISHOP,
Att'ys for Pl'ffs in Error.

255 [Endorsed:] File No. 20,141. Supreme Court U. S., October Term, 1905. Term No. 232. Charles E. Yates *et al.*, Plaintiffs in Error, *vs.* Thomas Bailey. Assignment of Errors & designation by P. E. of parts of record to be printed with notice and acceptance of service. Filed May 1, 1906.

256 In the Supreme Court of the United States.

CHARLES E. YATES ET AL., Plaintiffs in Error,
vs.
THOMAS BAILEY, Defendant in Error.

Designation for Printing from the Bill of Exceptions of the Evidence in the Above Entitled Cause.

The defendant in error in the above entitled cause having been served with notice on April 27, 1906, by the plaintiffs in error, of certain designations for printing from the bill of exceptions of the

evidence in said cause, does now hereby request the Clerk of the Supreme Court of the United States to print the following designated portions of the bill of exceptions aforesaid in addition to that heretofore designated by the plaintiffs in error as aforesaid.

1. Commencing with the words "Oath of Directors" on page 36, to the words "R. C. Outcalt, Notary Public" at page 37 inclusive.

2. Certificate. Commencing with the words "Treasury Department. Office of" on page 54, take to the words "Deputy & Acting Comptroller of the Currency" on page 55 inclusive.

3. Report of August 1, 1887, including all of page 73.

4. Report of October 5, 1887, including all of page 75.

5. Commencing at top of page 79, to the words "Accts. solicited, Banks, Bankers and Merchants" on same page.

6. Report of December 12, 1888, including all of page 81.

7. Report of September 30, 1889, including all of page 84.

8. Report of December 11, 1889, including all of page 86.

9. Report of December 19, 1890, including all of page 88.

10. Report of July 9, 1891, including all of page 91.

11. Report of September 25, 1891, including all of page 93.

12. Report of December 2, 1891, including all of page 95.

13. Testimony of H. T. Jones, commencing at top of page 102, to the middle of page 108 inclusive, omitting objections and rulings thereon.

257 14. Testimony of G. W. Post, commencing on page 108 with the following words "G. W. Post called as a witness on behalf of the plaintiffs" etc., to the last question on page 112 inclusive, omitting objections and rulings thereon.

15. All testimony of G. W. Post on pages 110, 111 and 112 except the last question, omitting objections and rulings thereon.

16. Testimony of Edward Hurlbert, Jr., commencing on page 114, to and including the first question and answer thereto on page 118, ending with the words "A. I do not," omitting objections and rulings thereon.

17. Redirect examination of Edward Hurlbert, Jr., commencing with page 132 and including page 133 except questions and answers numbered 5, 6 and 7, and including page 134 to the words "that is all," omitting objections and rulings thereon.

18. Testimony of Edward Hurlbert, Jr., on page 145, commencing with the words "By Mr. Thomas" to and including the words "Witness excused."

19. Testimony of A. L. Clark on pages 146 to 148 inclusive to the words "Witness excused," omitting objections and rulings thereon.

20. Testimony of F. S. Johnson on pages 148 to 150 inclusive, omitting objections and rulings thereon.

21. Testimony of Leonidas M. Lawson, commencing at page 159, to and including first answer on page 178 as follows: "A. No such payment was made" omitting objections.

22. Testimony of William Ayres, Jr., commencing at page 182, to and including first question and answer on page 184.

23. Same witness, commencing with the last question on page

201, including all of page 202 and the first two lines on page 206, omitting objections.

24. Same witness, commencing with last question on page 213, to and including the first answer on page 214, omitting objections.

25. First two lines on page 240.

26. Certificate of judgment, Exhibit 991, on page 242.

258 27. Testimony of I. A. Baker on page 243. The 1, 2 and 3 questions and answers, omitting objections.

28. Certificate of judgment. Exhibit 992, on page 245.

29. Last question and answer on page 244, omitting objection.

30. All of page 247, omitting objections.

31. All of Exhibit 993, on page 249.

32. Testimony of I. A. Baker on pages 251 and 252, omitting objections.

33. All of Exhibit 994, on page 253.

34. Testimony on page 255, omitting objections.

35. All of Exhibit 995, on page 257 including last two lines on page 256.

36. Testimony of G. W. Shreck, pages 280 to 284 inclusive, omitting objections and rulings thereon.

37. Testimony of C. W. Hamilton from page 296 to 300 inclusive, omitting objections.

38. By-laws. Section 17 on page 318, and Section 26 on page 319.

39. On page 323 commencing with the words "Page 36—Special Meeting" to and including the first ten lines on page 324 and ending with the words "R. C. Outcalt, Sec'y."

40. Testimony of H. J. Whitmore, commencing with page 340, to and including second answer on page 343 ending with the words "to the Marsh National" omitting objections.

41. Same witness, on page 345 commence with the last question—take to and including first ten lines on page 348, ending with the figures "$15,050.88," omitting objections.

42. Same witness, on page 348, commence with the last question and take to and including the first four lines on page 352, ending with the words "Donnell, Lawson & Simpson."

43. Same witness, on page 354, commence with the first question and take to and including the second answer on page 356, ending with the words "Marsh National Bank" omitting objections.

44. Same witness, on page 357, commence with offer of Exhibit No. 1002 in following words "The entry offered, received and

259 read in evidence being as follows" and take to and including the last answer on page 371, ending with the words "of the Bank on that day," omitting objections.

45. Same witness, on page 372 commence with the second question (11 line from the top) and take to and including the first line on page 375, ending with the words "A. No sir," omitting objections.

46. Same witness, on page 375, commence with the second question on 14 line and take to and including the first line on page 376, ending with the words "A. Yes sir."

47. Same witness, all of page 379, omitting objections.

48. Same witness, on page 380, the second question and answer thereto, omitting objections.

49. Same witness, on page 382, commence with the last answer (5 line from bottom of page) and take to and including the last answer on page 384, ending with the words "A. No, there are none" omitting objections.

50. Same witness, on page 385, commence with the last two lines at bottom of page and take to and including page 392, omitting objections.

51. Same witness, on page 400, commence with the 12 line from the bottom and include that question and the answer following, ending with the words "A. I do."

52. Same witness, on page 401, commence with the 7 line from the bottom with the words "have you made an investigation" etc. and take to and including answer thereto on page 402, ending with the words "Yes sir" omitting objections.

53. Same witness, on page 404, commence with the third question and answer from bottom of page and include balance of page.

54. Same witness, on page 405, commence with third question (14 line from top of page) and take to and including the answer at top of page 406, ending with the words "it does" omitting objections.

55. Same witness, on page 432, commence with eighth line from the bottom (third question) and take to the bottom of page 438 omitting objections.

260 56. Same witness, on page 442, commence with the third question from the top (seventh line) take to and including answer on page 443 ending with the words "2nd of July."

57. Same witness, on page 444, commence with the second question near middle of page with the words "I will ask you" etc. and take to and including sixth answer on page 446, ending with words "I couldn't determine it from the books I have here to my own satisfaction."

58. Same witness, on page 453, commence with the fifth line (second question) from top of page and take to and including page 454, omitting objections.

59. Same witness, on page 457, commence with the two last lines at bottom of page and take to and including first two lines on page 459.

60. Same witness, on page 459, commence at third line from the bottom (last question) and take to bottom of page 460, omitting objections.

61. Same witness, on page 462, commence at top of page and take to the middle of page 464 ending with the words "Q. Does that include the surplus? A. No sir," omitting objections.

62. Same witness, on page 465, commence with thirteenth line from the bottom of the page (second question from bottom) and take to and including first thirteen lines on page 504, omitting objections.

63. Same witness, on page 520, commence at top of page omitting first line and take to and including all of page 527 omitting objections.

64. Same witness, on page 531, commence with second question (sixth line from top of page) and take to and including eleventh line from top of page 532 ending with the words "A. No sir" omitting objections.

65. Same witness, on page 535 commence with second question at top of page (nineth line from top) and take to and including the first line on page 554, omitting objections and omitting also the third question and answer on page 536 being lines from 16 to 19 inclusive.

66. Same witness, on page 561, commencing at top of page, to and including all of page 563, omitting objections.

261 67. Same witness, on page 564, commence at top of page and take to and including all of page 587.

68. Same witness, on page 588, take first four lines (first question and answer).

69. Same witness, on page 599, commence with first question (tenth line from top of page) and take to fifth line from bottom on page 591 ending with the words "shown in the published statement" omitting objections.

70. Same witness, on page 592, commencing with the last question on that page and take to the bottom of page 600 inclusive, omitting objections.

71. Same witness, on page 655, commence with the sixth question (twelfth line from top of page) and take the balance of that page.

72. Same witness, on page 679, commence at top of page and take to bottom of page 693 inclusive, omitting objections.

73. Same witness, all of pages 708, 709, 710, 711 and 712 *including objections and rulings of court thereon.*

74. Same witness, all of page 713 except the last question, ending with the words "is these copies of published statements."

75. Same witness, on page 755, question on that page and answer thereto on page 756 omitting objections.

76. Same witness, all of page 758 except the last question at bottom of page, omitting objections.

77. On page 765 commence with the second question at the middle of page and take to and including the first answer (first four lines) at top of page 769, omitting objections.

78. Same witness, take last question on page 793 and answer thereto on page 794.

79. Same witness, take question on page 812 and answer thereto on page 813, omitting objections.

80. Schedules of certificates of taxes. Commence at top of page 813 and take to middle of page 829 inclusive, to the words "cross examination."

262 81. Testimony of E. Jacobs. Commence at top of page 864 and take to and including page 903, omitting objections.

82. Same witness, commence with question on page 911 and take the remainder of witness'*es* testimony to the words "witness excused" on page 916, omitting objections.

83. All of testimony of Thomas Bailey, pages 916 to 934 inclusive, omitting objections.

84. All of the testimony of Fritz Beckard, pages 934 to 949 inclusive omitting objections.

85. Testimony of Whitmore on pages 950 and 951 except last question on page 951, omitting objections.

86. Same witness, on page 960, commence with the second question (thirteenth line) and take to and including the first answer (first twelve lines) on page 963, omitting objections.

87. Same witness, on page 968, commence with the third question (tenth line) and take to page 970 inclusive ending with the fourth answer on the eleventh line.

88. Testimony of H. T. Jones. Commence at top of page 974 and take to and including first answer (fifth line) on page 1037, ending with the words "honestly kept" omitting objections.

89. Bill of sale and chattel mortgage. Commencing at top of page 1199 and take to and including page 1204.

90. Take first four lines on page 1312.

91. Deposition of John W. McDonald, Receiver. Take all of page 1323.

92. Same witness, on page 1325 take the first and second questions and answers.

93. Same witness, on page 1360, commence with the words "April 8, 1902, 2 O'Clock P. M." Ques. 197, and take to bottom of page 1370 inclusive omitting objections.

94. Same witness, on page 1374, commence with the words "redirect examination" and take to bottom of page 1377 inclusive, omitting objections.

263 95. Deposition of J. E. Hill. Commence at page 1382 and take to and including page 1392 ending with answer to question No. 299 with the words "A. I did not."

96. Same witness, take all of page 1408.

97. Deposition of D. J. Carnes. Commence at top of page 1417 and take to and including answer to interrogatory 28 on page 1423 ending with the words "into a good many thousands of dollars."

98. Same witness, on page 1427, commence with the words "redirect" (fourth line from top) take to and including signature of "Frank Langlas, Jr., Notary Public" on page 1429.

99. Deposition of P. M. Alden on page 1429. Commence with the words "P. M. Alden of lawful age" etc., take to and including answer to interrogatory 34, Page 1432 (ninth line from top).

100. Same witness, on page 1436, commence with the word "redirect" and take to and including the words "Frank Langlas, Jr., Notary Public" near bottom of page 1437.

101. Deposition of John W. McDonald, Receiver. Commence at top of page 1441 and take the first four questions and answers on same page, ending with the words "A. Yes" on fifteenth line.

102. Same witness, on page 1452, commence with the fourth question (sixteenth line from top) with the words "you may produce record book No. 1" etc., and take to and including the third answer on page 1458 ending with the words "A. They were rediscounted."

103. Same witness, on page 1463, commence with the words "May 15, 1902, 9 A. M." and take to and including the third answer on page 1466, ending with the words "A. Yes, I think so" omitting objections.

104. Same witness, take last question on page 1466 and answer thereto on page 1467, ending with words "A. Yes" omitting objections.

105. Same witness, on page 1471, commence with fourth question (thirteenth line from top) and take to and including the first answer on page 1472 ending with the words "A. Yes" omitting objections.

106. Same witness, on page 1473, commence with the third question (fourteenth line) take to and including the first question on page 1474 ending with the words "Q. You may refer to the ledger?" omitting objection.

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107. Same witness, on page 1484, commence with the words "Thomas: I now repeat my original question" etc., and take to and including second answer (eighth line) on top of page 1488, ending with the figures "A. $331,359.86," omitting objections.

108. Same witness, on page 1492, commence with the last question on seventh line from bottom of page and take to and including first question and answer on page 1504 ending with the figures "A. $300,000." omitting objections.

109. Same witness, on page 1504, commence with the last question at bottom of page (sixth line from bottom) and take to and including first question and answer at top of page 1506.

110. Same witness, on page 1508, commence with the fourth question (fourteenth line from top) and take to and including third answer on page 1519 ending with the words "Oh—I think they have very little value."

111. Same witness, on page 1521, commence with the last question (fourth line from bottom of page) and take to and including second answer on page 1524 ending with the words "Yes" on ninth line from top.

112. Same witness, commence at top of page 1540 and take to bottom of page 1541 inclusive, omitting objections.

113. Testimony of R. C. Outcalt. Commence at top of page 1548 and take to cross-examination on page 1606, omitting objections.

114. Testimony of Hale. Commence at top of page 1612 and take to and including answer to fifth question on page 1622 (seventh line from top of page) omitting objections.

115. Same witness, on page 1623, commence with the second question from the bottom and take to bottom of that page.

116. Same witness, on page 1624, take last question on that page and first answer on page 1625.

117. Same witness, take last question on page 1625 and all of page 1626 except the last two lines, ending with the words "A. They could not."

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118. Same witness, on page 1647, commencing with the third question (fourteenth line from top) with the words "Now Mr. Hale" etc. and end with the direct examination near bottom of page with the words "A. They are. Yes sir."

L. C. BURR,
R. S. NORVAL, &
J. J. THOMAS,
Attorneys for Defendant in Error.

Received a copy of the above designations for printing from the bill of exceptions of the evidence in the above entitled cause this 7th day of July, 1906, but we object to printing the designated portions of the record because not necessary to a review of the errors relied upon for reversal, and the costs of printing the same should be taxed to defendant in error.

J. W. DEWEESE,
F. E. BISHOP,
Attorneys for Plaintiffs in Error.

266 [Endorsed:] 232, 20141. In the Supreme Court of the United States. Charles E. Yates, *et al.*, Plaintiffs in error, *vs.* Thomas Bailey, Defendant in error. Designations for printing from the Bill of Exceptions.

267 [Endorsed:] File No. 20,141. Supreme Court U. S. October Term, 1906. Term No. 232. Charles E. Yates *et al.*, Pl'ffs in Error, *vs.* Thomas Bailey. Designation by counsel for the defendant in error of additional parts of bill of exceptions to be printed & proof of service of copy of same. Filed July 13th, 1906.

Endorsed on cover: File No. 20,141. Nebraska supreme court. Term No. 232. Charles E. Yates, Louisa Hamer, adm'x of Elis P. Hamer, deceased, Charles W. Mosher *et al.*, plaintiffs in error, *vs.* Thomas Bailey. Filed March 20th, 1906. File No. 20,141.